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SUPREME COURT, U. S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1963

## No. 110

WILLIAM MALLOY, PETITIONER,

*vs.*

PATRICK J. HOGAN, SHERIFF OF HARTFORD COUNTY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

PETITION FOR CERTIORARI FILED APRIL 19, 1963

CERTIORARI GRANTED JUNE 3, 1963

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# IN THE SUPERIOR COURT OF HARTFORD COUNTY

## STATE OF CONNECTICUT

No. 124068

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WILLIAM MALLOY, of Windsor,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

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PETITION FOR WRIT OF HABEAS CORPUS—January 26, 1961

To the Superior Court now in Session in the County of Hartford:

Comes William Malloy, a resident of the Town of Windsor, praying a writ of habeas corpus and complains and says:

1. He is now being held and confined in the county jail in said County of Hartford by Patrick J. Hogan, Sheriff of said county and keeper of said jail.

2. Said imprisonment is illegal in that his imprisonment is unlawful on the ground that his constitutional rights under the Fifth Amendment to the Constitution of the United States and Article 1, Sec. 9, of the Constitution of the State of Connecticut were violated in that he was denied the right to refrain from answering questions before a Grand Jury that would tend to incriminate him.

3. The complainant prays that this court issue a writ of habeas corpus to bring him before said court so that justice may be done.

Dated at Hartford, this 26th day of January, 1961.

William Malloy, By Harold Strauch, His Attorney.

Personally appeared the above named William Malloy and made oath that he verily believes that he is illegally deprived of his liberty for the reasons hereinbefore stated, before me.

Harold Strauch, Commissioner of the Superior Court.

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IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

WRIT OF HABEAS CORPUS—January 27, 1961

William Malloy, of Windsor, having made application to the Superior Court in and for the County of Hartford alleging that he is illegally held and confined in the county jail in said county by Patrick J. Hogan, the keeper thereof, and prays a writ of habeas corpus, It Is Ordered:

[fol. 2] That the said Patrick J. Hogan, keeper of said jail, bring the said William Malloy before the said court at the court house in said county on the 1st day of February, 1961, at 10:00 o'clock in the forenoon, with the cause of his confinement, that justice may be done; and it is further ordered that the clerk of said court forthwith place in the hands of said Patrick J. Hogan, Sheriff and keeper as aforesaid, or one of his deputies, a true and attested copy of the above application, of this order, and due return make.

Dated at Hartford, this 27th day of January, 1961.

By the Court,

Dominic A. DiCorleto, Assistant Clerk.

To Any Deputy Sheriff of the County of Hartford or Any Constable of the City of Hartford—Greeting:

By Authority of the State of Connecticut, You are hereby commanded without delay to put a true and attested copy of the foregoing writ of habeas corpus into the hands of

the said Patrick J. Hogan, Sheriff of the County of Hartford, and make immediate return of said writ and of this order and of all your doings thereon, on the penalty of the law.

Dated at Hartford, Connecticut, this 27th day of January, 1961.

By the Court,

Dominic A. DiCorleto, Assistant Clerk of the Superior Court.

---

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

RETURN OF RESPONDENT—Filed January 31, 1961

The Respondent in obedience to the order of the Court to show cause why a writ of habeas corpus should not be granted responds and says that the Petitioner, William Malloy, is in no manner without law or right confined, imprisoned or deprived of his liberty, and further avers:

First Defense:

1. That the Respondent is the Correctional Director of Hartford State Jail, and is the keeper of said common jail in the Town of Hartford, County of Hartford.

[fol. 3] 2. That on January 26, 1961, the Petitioner was duly delivered into the keeping of the Respondent as said Correctional Director of Hartford State Jail and keeper of said common jail, together with a mittimus issued by the Clerk of the Superior Court for the County of Hartford directing that the Respondent as such Director and keeper of said Jail receive and safely keep said Petitioner within said Jail at his own expense, until he answers proper questions put to him in the course of an investigation conducted under the provisions of Section 54-47 of the Connecticut General Statutes, or until further order of the Court.

3. A copy of said mittimus is hereto attached marked, "Exhibit A."

4. The Respondent holds the Petitioner by virtue of the foregoing proceedings.

Second Defense:

The allegations set forth in the petition are denied.

Respectfully submitted,

Patrick J. Hogan, Correctional director of Hartford State Jail and keeper of said common jail, By John D. LaBelle, State's Attorney for Hartford County.

To the Sheriff of Hartford County, His Deputy, or to Either of the Constables of the Town of Windsor, in said County,

Greeting:

Whereas, William Malloy of Windsor, in said County was presented to the Superior Court holden at Hartford, within and for the County of Hartford, in the State of Connecticut at the term held on the first Tuesday of January, 1961, that is to say, on the 26th day of January, 1961, upon a complaint by John D. LaBelle, State's Attorney for Hartford County, that the said William Malloy failed to answer proper questions propounded to him in the course of an investigation conducted under the provisions of Section 54-47 of the General Statutes, and the Court after hearing has found that the said William Malloy has failed to answer proper questions in the course of such investigation and that he ought to be punished as for a contempt, [fol. 4] and it was ordered by said Court that he be committed to the Common Jail in said County, there to remain at his own expense, until he answers proper questions in the course of such investigation, or until further order of the Court, in accordance with Sections 54-47 and 51-35.

These Are, Therefore, by authority of the State of Connecticut, to command you to take and convey the said William Malloy to the Common Jail, in the Town of Hartford, in said County, and him deliver to the keeper thereof, and to leave with him this mittimus, and said keeper is hereby commanded to receive and safely keep the said William Malloy within said Jail at his own expense, until he answers proper questions in the course of said investigation, or until further order of the Court.

Hereof fail not.

Dated at Hartford, this 26th day of January, 1961.

---

EXHIBIT A TO RETURN OF RESPONDENT

By Order of said Court,

JOSEPH KEEFE,
*Assistant Clerk of the Superior Court.*

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, ss.:

Hartford, January 26, 1961.

Then and by virtue hereof, I took the within named William Malloy and conveyed him to the Common Jail at Hartford, and left with him this mittimus.

ATTEST:

(Signed) FRANCIS J. CHILONE,
*Special Deputy Sheriff.*

[fol. 5]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

PETITIONER'S REPLY—Filed February 1, 1961

1. So much of the Return of Respondent as alleges that the petitioner's confinement is within the law is denied.

2. With respect to the First Defense of the Return of Respondent, the allegations contained therein are admitted, except where it is alleged in paragraph 2 thereof that the delivery of the petitioner into the keeping of the respondent was a due delivery, which is denied.

Petitioner, By Harold Strauch, His Attorney.

---

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

MEMORANDUM OF DECISION—Filed February 7, 1961

This is an application for a writ of habeas corpus to obtain the release of the petitioner from the common jail to which the petitioner has been committed for his refusal to answer certain questions before the Hon. Ernest A. Inglis, State Referee, who has been designated in accordance with Sec. 54-47 of the General Statutes to conduct an inquiry to determine whether there is probable cause to believe that crimes, including gambling, have been committed in Hartford County.

The petitioner was arrested in a raid on premises at 600 Asylum Avenue, Hartford, on September 11, 1959, and was charged with two counts of pool selling in violation of Sec. 53-295 of the General Statutes. On November 5, 1959, he entered a plea of nolo contendere and was found guilty on one count and was ordered to pay a fine of $500.00 and was given a sentence of one year in the county jail to be suspended after 90 days when the petitioner was placed on probation for two years.

On January 16, 1961, pursuant to a subpoena the petitioner appeared before the Hon. Ernest A. Inglis, a State Referee, who is conducting an inquiry to determine whether there is probable cause to believe that crimes including gambling have been committed in Hartford County. At this hearing the petitioner was asked the following questions and the following transpired:

[fol. 6] Examination by Mr. LaBelle:

Q. What is your name?

A. William Malloy.

Q. Where do you reside?

A. 418 Mattianuck Avenue, Windsor, Connecticut.

Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford? And were you convicted on November 5, 1959, in the Superior Court as a result of that arrest on charges of poolselling?

A. I refuse to answer any questions on the ground it may tend to incriminate me.

Q. You understand, do you, that I am questioning about a matter on which you are already convicted and there can be no incrimination in that?

A. I refuse to answer on the ground that it might incriminate me.

Q. On November 5, 1959, when you were convicted on the arrest made on September 11, 1959, for whom were you working?

A. I refuse to answer on the ground it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in Superior Court on November 5, 1959, who selected your counsel?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. On the same day, September 11, 1959, and for your appearance in court, and you were to appear in superior court on November 5, 1959, who paid your counsel?

A. I refuse to answer.

Q. Who paid your fine for your conviction on November 5, 1959?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. After your arrest on September 11, 1959, the same arrests for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Who paid your bondsman?

A. I refuse to answer on the grounds that it might tend to incriminate me.

[fol. 7] Q. Do I understand you refuse to answer any questions put to you this morning?

A. I refuse to answer the question on the grounds it might tend to incriminate me.

Mr. LaBelle: It seems, Your Honor, the matter has to be referred for contempt.

The Referee: Have you had any advice of a lawyer on this?

The Witness: No, sir, I haven't; I just received my subpoena yesterday.

The Referee: Well, of course, it is up to you, but I suggest you talk with a lawyer. The State's Attorney will see to it that you are cited into court downstairs for contempt, and it might be wise for you to talk to a lawyer between now and then—the time you are summoned in by him.

I will leave this to you, Mr. State's Attorney, to proceed in accordance with the statute. That is all.

On January 25, 1961, the petitioner was recalled as a witness. He was asked the following questions and the following transpired:

Examination by Mr. LaBelle:

Q. You are William Malloy?

A. Yes, sir.

The Referee: And you have already been sworn, haven't you?

A. Yes, sir.

Q. Are you the William Malloy who on September 11, 1959, was arrested at 600 Asylum Street in Hartford?

A. Yes, sir.

Q. And as a result of that arrest are you the William Malloy who was convicted on November 5, 1959, in the Superior Court on charges of pool-selling?

A. Yes, sir.

Q. Now, on September 11, 1959, when you were arrested at 600 Asylum Street, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it might tend to incriminate me.

[fol. 8] Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, who furnished the money to pay your fine when you were convicted in the Superior Court?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, you were sentenced to some time in jail, were you not?

A. Yes, sir.

Q. And while you were in jail on that conviction of November 5, 1959, which resulted from your arrest on September 11, 1959, did you receive any pay from anyone while you were in jail?

A. No, sir.

Q. Did your family receive any pay or any money from anyone while you were in jail?

A. No, sir.

Q. After your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who furnished the money to pay your fine?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. What was the number of the apartment that you were arrested in on September 11, 1959, at 600 Asylum Street?

A. I don't recall the number of the apartment right now.

Q. Was it 823, do you remember that?

A. Offhand I would say I don't remember now.

Q. Do you know whose apartment it was?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. Do you know John Bergoti?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. I ask you again, Mr. Malloy, now, so there will be no misunderstanding of what I want to know. When you were [fol. 9] arrested on September 11, 1959, at 600 Asylum Street in Hartford, and the same arrest for which you were convicted in Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Mr. LaBelle: That's all the questions I have, Your Honor.

The Referee: Very well.

On January 26, 1961, the petitioner, upon the complaint of the State's Attorney, was presented at the criminal session of the Superior Court where after a hearing it was adjudicated that the petitioner had failed to answer proper questions propounded to him under the provisions of Sec. 54-47 of the General Statutes and the petitioner was committed to the common jail at Hartford at his own expense, until he answers proper questions in the course of said investigation or until the further order of the Court.

The claim of the petitioner is that his imprisonment at the common jail is illegal because it is in violation of the Fifth Amendment of the Constitution of the United States and Section 9 of Article 1 of the Constitution of the State of Connecticut. The Fifth Amendment to the Constitution of the United States is restrictive of national action only and does not secure to the petitioner exemption from self incriminations in the state courts. *Twining* v. *New Jersey*,

211 U.S. 78; *McCarthy* v. *Clancy*, 110 Conn. 482. The exemption from self incrimination is guaranteed to citizens of this State by Section 9 of Article 1 of the Constitution of the State of Connecticut which provides that in all criminal prosecutions the accused shall not be compelled to give evidence against himself. This immunity extends to proceedings before a grand jury. *State* v. *Kemp*, 126 Conn. 60, 72.

The question presented by this petition is whether the petitioner was justified in refusing to answer the questions propounded to him when called upon to give evidence before the State Referee. In passing upon this question it must be borne in mind that the privilege against self incrimination provided by the Constitution is solely for the benefit of the witness and not for the protection of others. *Rogers* v. *U.S.*, 340 U.S. 367. In passing upon the issue here involved the Court must determine whether the questions which the petitioner refused to answer were such [fol. 10] that the petitioner believed that to answer them would tend to incriminate him. *State* v. *Kemp*, supra, 73. The mere claim on the part of the petitioner that the evidence will tend to incriminate him is not sufficient. Having made his claim it is for the Court to determine whether, from the circumstances of the case and the nature of the evidence which the petitioner was called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger must be real and appreciable from the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable person would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. *McCarthy* v. *Clancy*, 110 Conn. 482, 489. The privilege of self incrimination, however, extends not only to questions which would in themselves support a conviction but also those which would furnish a link in the chain of evidence needed to prosecute the petitioner for a crime. To sustain the privilege it need

only be evident from the implication of the questions, in the setting in which they are asked, that a responsive answer or an explanation of why they cannot be answered might be dangerous because injurious disclosures can result. *Hoffman* v. *U. S.*, 341 U.S. 479. A consideration of the questions propounded to the petitioner does not evince a danger to the petitioner which is real and appreciable with reference to the ordinary operation of law in the ordinary course of things. The facts here are materially different from the facts before the Court in *Hoffman* v. *U. S.*, supra. In this case the petitioner has already been convicted of the crime of September 11, 1959, to which the questions are directed. He cannot again be charged with that crime or with conspiracy to commit it. He is now on probation and presumably not engaged in any activity which is in violation of law. There is no indication that John Bergoti who was inquired about is engaged in any activity which would place the petitioner in jeopardy by answering the question. In this connection it is to be noted that our Court in In re *Clayton*, 59 Conn. 510, upheld a statute providing that "on the trial of any person prosecuted for intoxication, if he shall be found guilty, it shall be the duty of the prosecuting [fol. 11] officer to request him to disclose ~~under oath~~ when, where and from whom he procured the liquor by which his intoxication was produced . . ." as well as a commitment for contempt for failure to make such disclosure.

Judgment may enter dismissing the writ.

Covello, J.

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124068

---

WILLIAM MALLOY, of Windsor,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

---

Present: Hon. Frank Covello, Judge.

JUDGMENT—February 7, 1961.

This application by William Malloy, of Windsor, for a Writ of Habeas Corpus alleging that he is unlawfully imprisoned in the County Jail by Patrick J. Hogan, Sheriff of said jail and praying that a Writ of Habeas Corpus issue to the defendant to bring him with the cause of his imprisonment, before said court, came to this court on January 27, 1961, and said writ was granted returnable to the Superior Court at its session to be held on February 1, 1961, and thence to the present time, when the parties appeared and were at issue to the Court, as on file.

The Court, having heard the parties, finds the issues for the defendant and finds that the said William Malloy is not unlawfully imprisoned.

Whereupon it is adjudged that the said William Malloy is not unlawfully imprisoned and said Writ be and hereby is dismissed.

By the Court,

Dominic A. DiCorleto, Assistant Clerk.

[fol. 12]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

APPLICATION FOR CERTIFICATION AND ORDER—
February 8, 1961

The undersigned, in accordance with Section 52-470 of the General Statutes (Revision of 1958) hereby requests a certification to the effect that a question is involved in the decision that was made in the herein case that ought to be reviewed by the Supreme Court of Errors.

Plaintiff, By Harold Strauch.

This certifies that a question is involved in the decision that was made in the herein case that should be reviewed by the Supreme Court of Errors.

February 8, 1961.

Covello, Judge.

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IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124068

---

WILLIAM MALLOY,

vs.

PATRICK J. HOGAN, Sheriff.

---

PLAINTIFF'S APPEAL—Filed February 9, 1961

In the above entitled action, the plaintiff appeals to the Supreme Court of Errors from the judgment rendered therein.

Plaintiff, By Harold Strauch, His Attorney.

You, William Malloy, plaintiff in the above entitled action, as principal, and you William J. Burke, of said Hart-

ford, deemed by me to be of sufficient financial responsibility to pay any costs which may be adjudged against William Malloy on his appeal in the above entitled action; as surety, acknowledge yourselves to be bound to the State of Connecticut, defendant in said action, in a recognizance in the sum of One hundred and fifty dollars that the said William Malloy will prosecute the foregoing appeal to full effect and pay any costs for which judgment may be rendered against him.

[fol. 13] Dated at Hartford, Connecticut, this 9th day of February, 1961.

Harold Strauch, Commissioner of the Superior Court.

[File endorsement omitted]

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IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

REQUEST FOR FINDING—Filed February 15, 1961

The appellant in the above entitled case respectfully requests a finding of facts for an appeal to the Supreme Court of Errors and submits the draft finding annexed hereto.

The questions of law which he desires to have reviewed are:

1. Did the Court err in ordering the plaintiff to answer the questions set forth in Exhibits A and B on file.

2. Did the Court err in deciding that the questions asked of the plaintiff were not in such a context that it was apparent that the answers, or an explanation of why no answers would be forthcoming, could be dangerous to the plaintiff as having a tendency to incriminate him.

3. Did the Court err in concluding that answers to the questions asked of the plaintiff could have no tendency to incriminate him.

4. Did the Court err in concluding that the provisions of the Fifth Amendment to the Constitution of the United States, Article 1, Sec. 9, of the Constitution of the State of Connecticut, and Secs. 51-35, 52-199 and 54-47 of the General Statutes, Revision of 1958, were not applicable to the questions asked of the plaintiff and that the insistence that the plaintiff answer said questions would not contravene his rights or privileges thereunder.

5. Did the Court err in concluding that the questions asked of the plaintiff were proper.

[fol. 14] 6. Did the Court err in concluding that the refusal to answer the questions asked of the plaintiff constituted a contempt and that the Court, which sentenced the plaintiff, had the jurisdiction to do so.

Plaintiff, By Harold Strauch, His Attorney.

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DRAFT FINDING—Filed February 15, 1961

10. The memorandum of decision may be made a part of this finding for use in any argument before the Supreme Court of Errors.

Plaintiff, By Harold Strauch, His Attorney.

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IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

FINDING

First: The following facts are found:

1. The petitioner was arrested in a gambling raid in Hartford on September 11, 1959, at 600 Asylum Street, and charged with two counts of pool selling in violation of Sec. 53-295 of the General Statutes, Rev. of 1958.

2. The petitioner on November 5, 1959, in the Superior Court for Hartford County, entered a plea of nolo contendere to the first count of an information charging him with pool selling on September 11, 1959, in violation of Sec. 53-295 of the General Statutes.

3. The Court on November 5, 1959, entered a finding of guilty to the first count of the information, and sentenced the petitioner to a fine of $500. and to one year in the county jail with execution of the jail sentence suspended after ninety days and two years probation.

[fol. 15] 4. The petitioner on January 16, 1961, and on January 25, 1961, was and still is on probation pursuant to the sentence of November 5, 1959.

5. On January 16, 1961, the petitioner pursuant to a subpoena, appeared as a witness before the Honorable Ernest A. Inglis, a State Referee, who, pursuant to Sec. 54-47 of the General Statutes, was appointed by the Superior Court to conduct and was conducting an inquiry to determine whether there was probable cause to believe that certain crimes including gambling have been committed in Hartford County.

6. The petitioner was ordered by the Court to reappear as a witness before the Honorable Ernest A. Inglis on January 25, 1961.

7. During his appearance on January 16, 1961, before the Honorable Ernest A. Inglis, a State Referee, the following questions were asked of the plaintiff to which he made the following answers:

Q. What is your name?
A. William Malloy.
Q. Where do you reside?
A. 418 Mattianuck Avenue, Windsor, Connecticut.
Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford? And were you convicted on November 5, 1959, in the Superior Court as a result of that arrest on charges of pool selling?
A. I refuse to answer any questions on the ground it may tend to incriminate me.

Q. You understand, do you; that I am questioning about a matter on which you are already convicted and there can be no incrimination in that?

A. I refuse to answer on the ground that it might incriminate me.

Q. On November 5, 1959, when you were convicted on the arrest made on September 11, 1959, for whom were you working?

A. I refuse to answer on the ground it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in Superior Court on November 5, 1959, who selected your counsel?

[fol. 16] A. I refuse to answer on the ground that it may tend to incriminate me.

Q. On the same day, September 11, 1959, and for your appearance in court, and you were to appear in Superior Court on November 5, 1959, who paid your counsel?

A. I refuse to answer.

Q. Who paid your fine for your conviction on November 5, 1959?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. After your arrest on September 11, 1959, the same arrests for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Who paid your bondsman?

A. I refuse to answer on the grounds that it might tend to incriminate me.

Q. Do I understand you refuse to answer any questions put to you this morning?

A. I refuse to answer the question on the grounds it might tend to incriminate me.

8. During his appearance on January 25, 1961, before the aforesaid State Referee, the following questions were asked of the plaintiff to which he made the following answers:

Q. Are you the William Malloy who, on September 11, 1959, was arrested at 600 Asylum Street in Hartford?

A. Yes, sir.

Q. And as a result of that arrest are you the William Malloy who was convicted on November 5, 1959, in the Superior Court on charges of pool selling?

A. Yes, sir.

Q. Now, on September 11, 1959, when you were arrested at 600 Asylum Street, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it might tend to incriminate me.

Q. On September 11, 1959, when you were arrested, and the same arrest for which you were convicted in the Superior Court on November 5, 1959, who furnished the money to pay your fine when you were convicted in the Superior Court?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

[fol. 17] Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, you were sentenced to some time in jail, were you not?

A. Yes, sir.

Q. And while you were in jail on that conviction of November 5, 1959, which resulted from your arrest on September 11, 1959, did you receive any pay from anyone while you were in jail?

A. No, sir.

Q. Did your family receive any pay or any money from anyone while you were in jail?

A. No, sir.

Q. After your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who selected your bondsman?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. As a result of your arrest on September 11, 1959, and the same arrest for which you were convicted on November 5, 1959, who furnished the money to pay your fine?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. What was the number of the apartment that you were arrested in on September 11, 1959, at 600 Asylum Street?

A. I don't recall the number of the apartment right now.

Q. Was it 823, do you remember that?

A. Off hand I would say I don't remember now.

Q. Do you know whose apartment it was?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. Do you know John Bergoti?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Q. I ask you again, Mr. Malloy, now, so there will be no misunderstanding of what I want to know. When you were arrested on September 11, 1959, at 600 Asylum Street in Hartford, and the same arrest for which you were convicted in Superior Court on November 5, 1959, for whom were you working?

A. I refuse to answer that question on the grounds it may tend to incriminate me.

[fol. 18] 9. All of the foregoing questions are contained in Exhibits A and B on file.

10. While the plaintiff answered some of the questions that were put to him, he refused to answer the remaining questions on the ground that the answers would tend to incriminate him.

11. The petitioner on January 26, 1961, upon the complaint of the State's Attorney, pursuant to Sec. 54-47 of the General Statutes, was presented at a criminal session of the Superior Court where a hearing was held and it was found by the Court that the petitioner had failed to answer proper questions propounded to him on January 16, 1961, and January 25, 1961, and he thereupon was ordered committed to the common jail at Hartford, at his own expense until he answers proper questions in the course of the aforementioned inquiry or until the further order of the Court.

12. The Superior Court in Criminal Session at Hartford on January 26, 1961, had jurisdiction over the petitioner.

13. All exhibits marked in evidence may be made a part of this Finding for use in any argument before the Supreme Court of Errors without being printed in the record.

Second. The following conclusions have been reached:

14. The petitioner has already been convicted of the crime of September 11, 1959, to which the questions were directed.

15. The petitioner cannot again be charged with the crime of September 11, 1959, or with conspiracy to commit that crime.

16. The questions propounded to petitioner do not indicate a danger to the petitioner of criminal liability which is real and appreciable with reference to the ordinary operation of law in the ordinary course of things.

17. The danger of incrimination to the plaintiff, in the event that he answered the questions propounded to him, was so remote and improbable that he should not have suffered it to influence him in his decision to refuse to answer them.

18. The plaintiff had no reasonable ground to fear or apprehend danger of criminal prosecution as the result of his being compelled to answer the questions that were asked of him.

[fol. 19] 19. The plaintiff could not be charged with any offense as the result of his answers to the questions propounded to him.

20. The compulsory answering of the questions propounded to the plaintiff would not be in violation of his rights under the Fifth Amendment of the Constitution of The United States, Article 1, Sec. 9, of the Constitution of the State of Connecticut, and Secs. 51-35, 52-199 and 54-47 of the General Statutes, Rev. of 1958.

21. The questions propounded to the plaintiff were proper, did not tend to incriminate him, and should have been answered.

22. The refusal of the plaintiff to answer the questions propounded to him constituted contempt.

23. The petitioner did not introduce any evidence and failed to show cause why he should not be punished as for a contempt for failure to answer proper questions before the State Referee.

24. The Superior Court in Criminal Session at Hartford on January 26, 1961, had jurisdiction to sentence the plaintiff for contempt for his refusal to answer the questions propounded to him before the Honorable Ernest A. Inglis, State Referee, on January 16, 1961, and January 25, 1961.

Covello, *J.*

---

In the Superior Court of Hartford County

State of Connecticut

Assignment of Errors—Filed November 15, 1961

The Court erred:

1. In incorporating in its Finding as a fact that the action of the Superior Court (criminal session) was correct in holding that the plaintiff had failed to answer proper questions propounded to him on January 16, 1961, and January 25, 1961, and that he be committed until he answer proper questions, being a part of paragraph 11 of First of said Finding, without evidence.

2. In finding the facts set forth in paragraph 12 of First of its Finding without evidence.

3. In reaching the conclusion stated in paragraph 15 through 24 of Second of its Finding without evidence to support the same.

4. In refusing to include or incorporate in its Finding paragraph 10 of First of the Draft Finding.

5. In overruling and denying the claims of law contained in paragraphs 1 through 6 of the Request for Finding.

[fol. 20] 6. In overruling and in refusing to include or incorporate in its Finding the claims of law contained in paragraphs 1 through 6 of the Request for Finding, which are as follows:

(a) The Court (criminal side) erred in ordering the plaintiff to answer the questions set forth in Exhibits A and B on file.

(b) The Court (criminal side) erred in deciding that the questions asked of the plaintiff were not in such a context that it was apparent that the answers, or an explanation of why no answers would be forthcoming, could be dangerous to the plaintiff as having a tendency to incriminate him.

(c) The Court (criminal side) erred in concluding that the answers to the questions asked of the plaintiff could have no tendency to incriminate him.

(d) The Court (criminal side) erred in concluding that the provisions of the Fifth Amendment to the Constitution of the United States, Article 1; Sec. 9 of the Constitution of the State of Connecticut; Secs. 51-35, 52-199 and 54-47 of the General Statutes, Revision of 1958, were not applicable to the questions asked of the plaintiff and that the insistence that the plaintiff answer questions would not contravene his rights or privileges thereunder.

(e) The Court (criminal side) erred in concluding that the questions asked of the plaintiff were proper.

(f) The Court (criminal side) erred in concluding that the refusal by the plaintiff to answer the questions asked of him constituted a contempt and that it had the jurisdiction to sentence the plaintiff for contempt.

7. In concluding upon all the evidence that the plaintiff was guilty of contempt in refusing to answer the questions that were put to him as set forth in Exhibits A and B on file.

8. In concluding upon all the evidence that the plaintiff was guilty of contempt beyond a reasonable doubt.

Plaintiff, By Harold Strauch, His Attorney.

[fol. 21]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

CORRECTION TO FINDING—Filed November 27, 1961

The Finding is hereby corrected by adding thereto the following:

Third. The plaintiff made claims of law directly contra to the conclusions reached by the Court.

Notwithstanding the plaintiff's claims of law the Court rendered judgment as on file.

Covello, J.

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IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124067.

EUGENE PICANO

*vs.*

PATRICK J. HOGAN, Sheriff.

---

STIPULATION AS TO JUDGMENT IN COMPANION CASES—December 8, 1961

Whereas an appeal in the above entitled case has been taken to the Supreme Court of Errors from the judgment rendered therein, and an assignment of errors has been filed, and whereas all of the issues in such appeal are the same as the issues involved in an appeal which has been taken from the decision of the Superior Court for Hartford County in the case of William Malloy vs. Patrick J. Hogan, Sheriff, Docket No. 124068, now upon the docket of the Supreme Court of Errors; and

Whereas it is desired that but one record be printed to present such issues to the Supreme Court of Errors.

Now, therefore, it is hereby stipulated by the parties that the record in this case shall not be printed, but that any judgment rendered by the Supreme Court of Errors upon the appeal taken in said case of William Malloy vs. Patrick J. Hogan, Sheriff shall be conclusive upon the parties in this case, and that the clerk of the Supreme Court of Errors for Hartford County (the county wherein the judgment was rendered) shall, upon the decision of said case of William Malloy vs. Patrick J. Hogan, Sheriff, enter the same judgment in this case.

Plaintiff, By Harold Strauch, His Attorney.

Defendant, By John D. LaBelle, His Attorney and State's Attorney for Hartford County.

Filed December 31, 1961.

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[fol. 22]

IN THE SUPERIOR COURT OF HARTFORD COUNTY

STATE OF CONNECTICUT

No. 124065.

---

GEORGE POLASHIAN

*vs.*

PATRICK J. HOGAN, Sheriff.

---

STIPULATION AS TO JUDGMENT IN COMPANION CASES—
December 8, 1961

Whereas an appeal in the above entitled case has been taken to the Supreme Court of Errors from the judgment rendered therein, and an assignment of errors has been filed, and whereas all of the issues in such appeal are the same as the issues involved in an appeal which has been taken from the decision of the Superior Court for Hartford County in the case of William Malloy vs. Patrick J. Hogan, Sheriff, Docket No. 124068, now upon the docket of the Supreme Court of Errors; and

Whereas it is desired that but one record be printed to present such issues to the Supreme Court of Errors.

Now, therefore, it is hereby stipulated by the parties that the record in this case shall not be printed, but that any judgment rendered by the Supreme Court of Errors upon the appeal taken in said case of William Malloy vs. Patrick J. Hogan, Sheriff, shall be conclusive upon the parties in this case, and that the clerk of the Supreme Court of Errors for Hartford County (the county wherein the judgment was rendered) shall, upon the decision of said case of William Malloy vs. Patrick J. Hogan, Sheriff, enter the same judgment in this case.

Plaintiff, By Harold Strauch, His Attorney.

Defendant, By John D. LaBelle, His Attorney and State's Attorney for Hartford County.

Filed December 31, 1961.

---

[fol. 23]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

December Term, 1962

---

WILLIAM MALLOY

*v.*

PATRICK J. HOGAN, Sheriff of the County of Hartford

---

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to the court, Covello, *J.*; judgment for the defendant and appeal by the plaintiff. No error.

Harold Strauch, for the appellant (plaintiff).

Harry W. Hultgren, Jr., with whom, on the brief, were John D. LaBelle, state's attorney, and George D. Stoughton, assistant state's attorney, for the appellee (defendant).

OPINION

KING, J. On September 11, 1959, the plaintiff was arrested in a gambling raid at 600 Asylum Street, Hartford, and charged, in two counts, with pool selling in violation of § 53-295 of the General Statutes. Subsequently, on November 5, he was allowed to plead nolo contendere to the first count of the information. A finding of guilty on that count was entered, and he was ordered to pay a fine of $500 and was sentenced to one year in jail, execution of the jail sentence to be suspended after ninety days of service and probation to be in effect for two years. What disposition was made of the second count of the information is not disclosed in the printed record, but the judgment file shows that a nolle prosequi was entered as to that count immediately after the imposition of the sentence under the first count.

At some time prior to January 16, 1961, the Superior Court in Hartford County, pursuant to § 54-47 of the General Statutes, entitled "Investigations into commission of crime," appointed the Honorable Ernest A. Inglis, formerly chief justice of Connecticut and then a state referee, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee, and on January 16, 1961, Malloy, who had been so subpoenaed, appeared and was asked certain questions by the state's attorney. Most of these Malloy refused to answer on the ground that an answer would tend to incriminate him. Thereupon, the state's attorney indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of § 54-47. The referee inquired of Malloy whether he had had the advice of an attorney and he replied that he had not, since he had just received the subpoena. The referee suggested that Malloy consult an attorney before he was summoned for contempt. Apparently, contempt proceedings were not then instituted, since nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. In the meantime, he had had full opportunity to consult counsel. The questions asked him on January 25, which he refused to answer on the same claim of

privilege, were practically identical with those he had been asked on his first appearance before the referee. The questions posed on both occasions are well summarized in Malloy's brief, substantially as follows: (1) For whom did Malloy work on September 11, 1959, the date he was arrested on the charge on which he was convicted? (2) Who selected and paid his counsel in connection with that charge and his defense thereto? (3) Who selected his bondsman and who paid him? (4) Who paid Malloy's fine? (5) What was the name of the tenant in the apartment in which he was apprehended? (6) Did he know John Bergoti?

On January 26, 1961, pursuant to § 54-47, Malloy was brought before the Superior Court and, after a hearing, was found to have failed to answer proper questions before the referee and was ordered committed to jail until he answered the questions or until the further order of the court. Malloy was thereupon committed to jail. Later in the day he made application for a writ of habeas corpus, directed to the defendant as the keeper of the jail, on the ground that the confinement in jail was illegal because it was based on a denial, in violation of the fifth amendment to the constitution of the United States and of § 9 of article first of the constitution of Connecticut, of Malloy's privilege of refusing to answer questions on the ground of self-incrimination. After a hearing on February 7, 1961, the court found the issues for the defendant and that Malloy was not unlawfully confined, and it dismissed the writ of habeas corpus. From that judgment Malloy took this appeal, his basic claim of error being that his refusal to answer the questions was privileged.

The law according the privilege against self-incrimination is not open to question, but there are often difficulties in its application. The privilege is not a general one; it is, [fol. 24] at least in all ordinary situations, to be claimed as to each question asked. *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir.); *McCarthy* v. *Clancy*, 110 Conn. 482, 490, 148 A. 551. It is not a prohibition against inquiry but confers an option of refusal to answer. *State* v. *Kemp*, 126 Conn. 60, 72, 9 A.2d 63. Our decisions from a time antedating the adoption of our constitution in 1818 have

consistently recognized and upheld the privilege, and it was, by § 9 of article first, incorporated in our constitution. See, for instance, *Grannis* v. *Branden*, 5 Day 260, 272 (a malpractice case decided in 1812); *Norfolk* v. *Gaylord*, 28 Conn. 309, 312 (a civil bastardy action decided over a century ago, in 1859). This section provides that an accused in a criminal prosecution "shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law." This language is very similar to that of the fifth amendment to the United States constitution, and cases interpreting the scope and application of the fifth amendment in federal proceedings are not without persuasive force in the interpretation of our own constitutional provision. In *McCarthy* v. *Clancy*, supra, 488, the privilege against self-incrimination was expressly held applicable to a witness subpoenaed in a statutory investigation similar to that in which Malloy was questioned; and in *State* v. *Kemp*, supra, the privilege was held applicable to a witness summoned to appear before a grand jury. It is clear that Malloy was clothed with this privilege when he went before the referee, so that the only question is whether his refusal to answer was justified under the rules governing the exercise of the privilege.

On the one hand, the determination whether a question does or does not tend to incriminate a person cannot be left solely to his judgment, since he could then refuse to answer obviously innocuous questions. On the other hand, if he were required completely to explain the precise basis for his belief that an answer to a given question would tend to incriminate him, he might well lose much, if not all, of the benefit of the privilege, since the state might utilize his explanation to obtain "leads" to evidence for future use against him. *Hoffman* v. *United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118; *Grannis* v. *Branden*, supra.

The rule is well stated in *McCarthy* v. *Clancy*, supra, 488: "[A] witness . . . has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate

him is not sufficient. . . . [He having] made his claim, it is then . . . [necessary for the judge] to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger 'must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Cockburn, C. J., in *Regina* v. *Boyes*, 1 B. & S. 311, 330; see also *Brown* v. *Walker*, 161 U.S. 591, 599, 16 Sup. Ct. 644 [40 L. Ed. 819]; *Mason* v. *United States*, 244 U.S. 362, 37 Sup. Ct. 621 [61 L. Ed. 1198]; *State* v. *Thaden*, 43 Minn. 253, 255, 45 N.W. 447; *State* v. *Wood*, 99 Vt. 490, . . . [134] Atl. 697; *Manning* v. *Mercantile Securities Co.*, 242 Ill. 584, 90 N.E. 238; 4 Wigmore on Evidence (2d Ed.) § 2271 [now 8 Wigmore § 2271 (McNaughton Rev. 1961)]. Moreover, a witness called before such a tribunal as that authorized by the statute in question, against whom no accusation or proceeding is pending, could not advance such a claim as a justification for a failure to answer any question whatsoever which might be asked; for rarely would it happen that all the evidence he might give in regard to the matter under investigation would tend to incriminate him. . . . [B]efore he would be justified in

refusing to answer [a given question], it must appear that there was reasonable ground to apprehend from it some real danger of incrimination. *Eckstein's Petition*, 148 Pa. St. 509, 515, 24 Atl. 63; *Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459. The same rules apply with regard to the production of documents. *Manning* v. *Mercantile Securities Co.*, supra, 592."

If remains to apply these principles to the questions asked Malloy. Only one question, whether Malloy knew John Bergoti, was not directly connected with, and restricted to the date of, Malloy's arrest in 1959 on the [fol. 25] pool selling charge. Bergoti is nowhere described or in any way identified, either as to his occupation, actual or reputed, or as to any criminal record he may have had. Indeed, the same may be said as to Malloy, except for the conviction for pool selling, which antedated his interrogation. Cf. *Hoffman* v. *United States*, 341 U.S. 479, 487, 71 S. Ct. 814, 95 L. Ed. 1118. Malloy made no attempt even to suggest to the court how an answer to the question whether he knew Bergoti could possibly incriminate him. That an answer might have incriminated Bergoti would be immaterial, since Malloy's privilege, such as it was, existed solely for his own personal protection and not for the protection of any other person. *Rogers* v. *United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344. On this state of the record the question was proper, and Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy "chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none." *In re Pillo*, 11 N.J. 8, 22, 93 A.2d 176; see also, *Hoffman* v. *United States*, supra, 489 (wherein it was held erroneous to refuse to consider explanations of a witness as to why he felt his answers to questions asked of him might incriminate him).

We turn now to the other questions asked Malloy, all of which were restricted in time and subject matter to the particular crime for which he was convicted in 1959. We need not decide whether, on their face and apart from any consideration of Malloy's immunity from prosecution,

the questions should or should not have been answered in the light of his failure to give any hint of explanation as to how answers to them could incriminate him. In any event, as hereinafter pointed out, he was apparently clothed with immunity from any prosecution growing out of answers to the questions, and he failed in any way to point out any infirmity in that immunity.

The state's attorney pointed out to Malloy that the questions were "about a matter on which you are already convicted and there can be no incrimination in that." Cf. *United States* v. *Smith*, 4 Day 121, 126. The referee evidently felt that no self-incrimination was involved. This is indicated by his suggestion to Malloy that he consult a lawyer before contempt proceedings were instituted. Of course, Malloy could not again be convicted of the identical crime of pool selling, and if this was the only possible danger of self-incrimination the privilege of refusal to answer would not exist. *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir.). However, the statute, § 53-295, under which the 1959 conviction was had, penalized a number of closely related acts, all basically concerned with pool selling, and as to many of these acts it provided that "each day of . . . [doing the act] shall constitute a separate offense." Even though Malloy could not again be tried on the identical charge on which he was convicted, he was entitled to assert his claim of privilege if there was a danger that his answers to the questions might furnish a "lead" to information which could be used to procure his conviction on a charge based on some other offense committed on the same day or on a charge based on the same or another offense committed on some other day, even the following day. See cases such as *Hoffman* v. *United States*, supra, 486; *Blau* v. *United States*, 340 U.S. 159, 161, 71 S. Ct. 223, 95 L. Ed. 170. Indeed, the second count of the 1959 information had charged the same type of pool selling on the day before the date charged in the first count, on which the conviction was had.

Where the state opposes a claim of privilege from self-incrimination on the ground of immunity from possible punishment—whether the immunity arises from a prior

conviction, from the bar of a statute of limitations, from a pardon, or from any other cause—the state has the burden of proving the adequacy of the protection afforded by the immunity claimed. *United States* v. *Goodman*, 289 F.2d 256, 262 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75; 58 Am. Jur., Witnesses, §84. A collection of cases illustrating the application of this general rule may be found in an annotation in 101 A.L.R. 389. Under the circumstances here, we prefer not to rest our decision on the ground that the state sufficiently sustained its burden of proving the adequacy of the immunity afforded by the 1959 conviction, considered alone.

There remains for consideration immunity arising from the bar of the Statute of Limitations. The maximum permissible penalty for any type of violation of the pool selling statute under which he was convicted (§ 53-295) was a fine of $500 and imprisonment of not over one year. Malloy's crime in 1959 was, therefore, a misdemeanor and not a felony. General Statutes § 1-1. The applicable limitation was "one year next after the offense has been committed." § 54-193. That period had expired before Malloy's interrogation in 1961. The referee's hearing was, in fact, more than a year after the conviction of Malloy and the disposition of the criminal case on November 5, 1959. It is true that the operation of the Statute of Limitations is suspended during periods in which the person charged "fled from and resided out of this state." But Malloy made no claim that he was without the state for any [fol. 26] period. In his habeas corpus application, and also at the hearing before the referee, he gave his residence as Windsor, Connecticut. His 1959 arrest was in Hartford. Under these circumstances, there would be no inference that he was at any time without the confines of the state so as to toll the Statute of Limitations. If at the hearing before the referee Malloy relied on absence from the state to toll the statute, he would have had to advance that claim in order to have it considered by the court on the question of the adequacy of the immunity from punishment provided by the Statute of Limitations. Nothing of this kind was attempted. Under the facts here,

we do not feel that the burden was on the state, at least in the first instance, of negating the naked possibility that the Statute of Limitations was tolled under the exception quoted above. See *State* v. *Lee*, 69 Conn. 186, 199, 37 A. 75. If, and to the extent that, cases such as *People* v. *Rockola*, 339 Ill. 474, 477, 171 N.E. 539, would require a holding to the contrary in this particular case, we cannot follow them.

Malloy did suggest that on a felony charge—what felony charge he did not specify—the applicable limitation would be five years. See General Statutes § 54-193; *In re Pillo*, 11 N.J. 8, 21, 93 A.2d 176. As far as appears, the only criminal activity in which Malloy had ever engaged was the misdemeanor of pool selling, and this only in September, 1959. There is nothing to indicate any danger to Malloy of a prosecution for any felony. Malloy also mentioned, before us, a possible prosecution for conspiracy to commit some unspecified crime, and something was made of the fact that the Statute of Limitations on a continuing conspiracy does not start to run until the last overt act is committed. *State* v. *Kemp*, 126 Conn. 60, 85, 9 A.2d 63. There is nothing to suggest a continuing conspiracy. Nor is there anything to indicate any possible danger to Malloy of a prosecution for any conspiracy other than perhaps a conspiracy to violate the pool selling statute. For such a conspiracy, the limitation is but one year, since it is the same for a conspiracy to commit a misdemeanor as for the misdemeanor itself. General Statutes §54-197. In all this, Malloy confounds vague and improbable possibilities of prosecution with reasonably appreciable ones. Under claims like his, it would always be possible to work out some finespun and improbable theory from which an outside chance of prosecution could be envisioned. Such claims are not enough to support a claim of privilege, at least where, as here, a witness suggests no rational explanation of his fears of incrimination, and the questions themselves, under all the circumstances, suggest none.

Although the claim was not made by Malloy, it is true that the state did not prove, as clearly as would have been desirable, that there was no prosecution of any sort actually instituted and outstanding against Malloy to which

the Statute of Limitations would not be an effective bar. *United States* v. *Goodman*, 289 F.2d 256, 263 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75. That there was no such prosecution was, however, implicit in the statement of the state's attorney to Malloy that he could not be incriminated by answering the questions, and Malloy makes no claim that there was any such prosecution. Under all the circumstances, and in the absence of any hint of explanation from Malloy, we do not think that it is necessary, in this particular case, to reverse the court below because the state went no further in its evidence on this point.

The fifth amendment does not apply, as such, to state courts. *Cohen* v. *Hurley*, 366 U.S. 117, 118 n.1, 81 S. Ct. 954, 6 L. Ed. 2d 156. However, the fourteenth amendment, in its guarantee of due process, probably does prohibit a state court from so ruling on a claim of privilege from self-incrimination as to violate the fundamental concepts of justice and a fair trial. Ibid.; *Adamson* v. *California*, 332 U.S. 46, 51, 67 S. Ct. 1672, 91 L. Ed. 1903. But as already pointed out, Malloy did not, in respect to any of the questions he refused to answer, bring himself within the settled rules defining the right to assert a privilege against self-incrimination. Thus there could be no violation of due process, and there was no error in Malloy's commitment for contempt.

There is no error.

In this opinion the other judges concurred.

[fol. 27]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

No. 5244

On Appeal from Superior Court

Hartford County

---

WILLIAM MOLLOY, of the Town of Windsor, County of Hartford, and State of Connecticut,

vs.

PATRICK J. HOGAN, Sheriff of the County of Hartford.

---

JUDGMENT—January 3, 1963

This appeal by the plaintiff from the judgment of said Superior Court was allowed by said Court on the 9th day of February 1961.

On the 15th day of November 1961, the appellant filed his assignments of error claiming error in the record, judgment, proceedings and decisions of said Court on questions of law arising in the trial as may appear in the certified transcript of record on file in this Court, and said appeal came to this Court at its term holden on the first Tuesday of December 1961, when the parties appeared and thence by continuance to the present term.

This Court, having heard the parties, finds that in the record, judgment, proceedings and decisions of said Court there is no error.

It is therefore considered and adjudged that there is no error.

and that the defendant recover of the plaintiff his costs taxed at ..... dollars and ..... cents.

Judgment entered January 3, 1963. By the Court,

Raymond G. Calnen, Clerk.

[fol. 28] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 29]

SUPREME COURT OF THE UNITED STATES

No. 1031—October Term, 1962

WILLIAM MALLOY, Petitioner,

vs.

PATRICK J. HOGAN, Sheriff of Hartford County.

ORDER ALLOWING CERTIORARI—June 3, 1963

The petition herein for a writ of certiorari to the Supreme Court of Errors of the State of Connecticut is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 116

WILLIAM MALLOY

*Petitioner,*

*—versus—*

PATRICK J. HOGAN,
Sheriff of Hartford County,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

HAROLD STRAUCH
234 Pearl Street
Hartford 3, Connecticut
*Counsel for Petitioner*

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| *State v. Griswold*, 67 Connecticut 290 | 6 |
| *State v. Magnano*, 97 Connecticut 543, 546 | 7 |
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| *U.S. v. Courtney*, 236, F2d 921 | 10 |
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| *West Virginia Board of Education v. Barrett*, 319 U.S. 624, 633 | 6 |
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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|---|---|
| WILLIAM MALLOY<br>*Petitioner,*<br>*v.*<br>PATRICK J. HOGAN,<br>Sheriff of Hartford County,<br>*Respondent.* | No. ..... |

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

William Malloy, the petitioner herein, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Errors of the State of Connecticut entered on the 22nd day of January, 1963, affirming the judgment of the Superior Court for Hartford County at Hartford holding the petitioner in contempt of court for failing to answer questions asked of him in an investigation in the probable commission of crimes in Hartford County.

### OPINION BELOW

The opinion of the Supreme Court of Errors is reported in Vol. _____ Conn. _____, and in Conn. Law Journal, Vol XXIV No. 12, pg. 3, issue of January 22, 1963, and it appears in Appendix B, infra, pg. B-1.

## JURISDICTION

The judgment of the Supreme Court of Errors was entered on January 22, 1963. The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257 (3). The constitutional question was originally raised in the trial court and assigned as error to the said Supreme Court of Errors, which ruled thereon. (Appendix B).

## QUESTION PRESENTED

May the petitioner, who had been convicted in Hartford, Connecticut, of a state crime in 1959 and who, in 1961, refused to answer incriminatory questions put to him by a Board duly constituted to investigate the probable commission of crimes in Hartford County, be denied the constitutional right not to testify against himself, under the Fifth Amendment as supplemented by the Fourteenth Amendment, by a ruling of the highest court of that State that the Fifth Amendment does not apply to state proceedings and by an insistence upon applying its state standards, rather than the more liberal federal standards, in determining whether or not the questions asked of the petitioner were sufficiently innocous as to make them harmless and, thus, properly answerable.

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fifth Amendment.

## STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1-1, 51-35, 52-199, 53-295, 54-47, 54-193 and 54-197 of the General Statutes of Connecticut, Revision of 1958, (Appendix A).

## STATEMENT OF THE CASE

On September 11, 1959, as the result of a general raid that was conducted in the Hartford area by the State and Hartford police departments, the petititioner, along with others, was arrested in an apartment at 600 Asylum Street, Hartford.

He was found guilty of poolselling, fined five hundred dollars, and he was given a one-year sentence in the County jail. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years.

Thereafter, on January 16 and 25, 1961, the petitioner appeared before the Hon. Ernest A. Inglis, who was conducting an investigation to determine whether there was probable cause to believe that crimes were being committed in Hartford County.

On both days, the petitioner answered several questions, but he refused to answer the following questions that were posed by the State's Attorney: (1) For whom did he work on September 11, 1959; (2) Who selected and paid his counsel in connection with his arrest on September 11, 1959, and his subsequent appearances in court due to said arrest; (3) Who selected and paid his bondsman; (4) Who paid his fine; (5) The name of

the tenant of the apartment in which he was apprehended; and (6) Did he know one John Bergoti.

His refusal was based upon his rights under the Fifth Amendment, believing that to answer the foregoing questions would incriminate him.

In due course, he was found guilty of contempt. He appealed to the Supreme Court of Errors from the judgment of the lower court dismissing an application for a writ of habeas corpus to release him from jail, to which he had been committed because of his refusal to answer the aforesaid questions.

The petitioner assigned as error the conclusions of the lower court, essentially to the effect that (1) having been convicted of the crime of poolselling in 1959, he cannot be charged again with that crime or a conspiracy to commit that crime (overlooking that conspiracy is a separate offense that is independent of the unlawful act which is its purpose. *State v. Phaillice*, 134 Conn. 181, 185); (2) the questions that were propounded to the petitioner were so remote and so harmless that there was no reasonable ground to fear any prosecution by answering them (overlooking that the petitioner is in the best position to know whether or not it was dangerous to answer the questions and that, having been involved in one area of crime, he could also have been involved — previous to the inquiry or at the time thereof — in other areas of criminal activity that would come to light if he answered, especially as he could surmise, with a fair degree of accuracy, that an experienced State's Attorney would not ask frivolous or harmless questions of him); and (3) that the compulsory answering of the questions would not violate the petitioner's rights under the Fifth Amendment, nor

his equivalent rights under Article 1, Sec. 9, of the Constitution of the State of Connecticut.

The Supreme Court of Errors upheld all the conclusions of the lower court. In its decision, the Court correctly indicated that the petitioner was properly brought before the Hon. Ernest A. Inglis, who was inquiring into crime in Hartford County in 1961 under the provisions of Sec. 54-47 of the General Statutes of the State of Connecticut, Revision of 1958; that his conviction in 1959 was for the crime of poolselling, Sec. 53-295 of said General Statutes; and that this offense was a misdemeanor. Sec. 1-1 of said General Statutes.

As at least a partial basis for its decision, it also concluded that the statute of limitations relating to misdemeanors, which becomes operative after 1 year, Sec. 54-193 of the said General Statutes, would effectively bar any possible prosecution that could result from any admission or testimony that he might have given. This is in error as the petitioner could have been involved, very reasonably and easily, in the commission of a felony, which has a five year statute of limitations, Sec. 54-193, supra, or a conspiracy to commit a felony, for which the statute of limitations runs up to fifteen years. Sec. 54-197 of the said General Statutes. In this contingency, he would be exposed to prosecution.

## REASONS FOR GRANTING WRIT

The application of the Bill of Rights to federal proceedings is fully recognized. It is enforceable. But its application to state proceedings has been, and still continues to be, a source of conflict and difficulty. The

resolution of this conflict in respect to state proceedings, particularly in connection with the clause of the Fifth Amendment protecting a person from acting as a witness against himself, is sought by this Writ.

Historically, the Federal courts have held, starting with the decision of *Barron v. Baltimore*, 7 Peters 243, 8 L. ed. 672, that the Bill of Rights did not apply to State matters. After the adoption of the Fourteenth Amendment and particularly since 1925, there has been a steady turn from this view. As a result, this Court has ruled (a) that the First Amendment must be observed by the States (*Gitlow v. New York*, 268 U.S. 652, 666; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 633; *DeJonge v. Oregon*, 299 U.S. 353, 364; *Bridges v. California*, 314 U.S. 252, 277; *Palko v. Connecticut*, 302 U.S. 327); (b) that the requirement of the Fifth Amendment that just compensation shall be paid for private property taken for public use must be observed by the States (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241); (c) that the requirement of the Sixth Amendment that an accused shall have the assistance of counsel for his defense must be observed by the States (*Powell v. Alabama*, 287 U.S. 45, 68-69); and (d) that the requirement of the Fourth Amendment against unreasonable searches and seizures must be observed by the States. *Mapp v. Ohio*, 367 U.S. 643, 6 L. ed. (2nd) 1081, 1085, 1086.

It is also historically correct to note that the Supreme Court of Errors of the State of Connecticut has been quite reluctant to permit the application of the Bill of Rights, especially the Fourth and Fifth Amendments, to state proceedings. *State v. Griswold*, 67 Conn. 290; *State v. Gaetano*, 96 Conn. 306, 350;

*State v. Magnano*, 97 Conn. 543, 546; *McCarthy v. Clancy*, 110 Conn. 482, 500; *Pickett v. Marcucci*, 112 Conn. 169, 173; *State v. Carol*, 120 Conn. 573, 575. However, by virtue of *Mapp v. Ohio*, supra, it is now in agreement that the Fourth Amendment is applicable, (*State v. DelVecchio*, 149 Conn. 567), but it still clings tenaciously to the view that the requirement of the Fifth Amendment against self-incrimination applies to the Federal courts only.

This Court, having recently declared in *Mapp v. Ohio*, supra, that the provision against unreasonable searches and seizures in the Fourth Amendment must apply to state proceedings, should also declare that the provision against self-incrimination in the Fifth Amendment should apply with equal force to the States, as both of these provisions are so analogous and similar in purpose and scope that there is no valid reason for delaying further such a pronouncement. To do so would be in keeping with *Boyd v. U.S.*, 116 U.S. 616, 630, in which it was urged that the constitutional provision for the security of a person should be liberally construed and that it is the duty of the Courts to be watchful against any stealthy encroachments upon these rights. So also, in *Weeks v. U.S.*, 232 U.S. 383, 393, it was said that "the efforts of the courts and their officials to bring the guilty to punishment, praisworthy as they are, are not to be aided by the sacrifice of these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

It is true that in *Adamson v. California*, 322 U.S. 46, 91 L. ed. 1903, it was held that the clause of the Fifth Amendment protecting a person from being a witness against himself was not made effective to state

proceedings by the Fourteenth Amendment. This was a 5 to 4 decision and it was modified in the later case of *Rochin v. California*, 342 U.S. 165, albeit on the basis that the Due Process Clause becomes effective upon the States where the method of obtaining the incriminating evidence offended "a sense of justice," rather than on the specific premise of the Fifth Amendment. Thereafter, in the case of *Irvine v. California*, 347 U.S. 128, 98 L. ed. 561, it was held in another 5 to 4 decision that a State court conviction, even though based upon illegally obtained evidence, will stand pursuant to *Wolf v. Colorado*, 338 U.S. 25, 27, 93 L. ed. 1782, 1785. The majority distinguished this case from *Rochin v. California*, supra, by the absence of any physical assault upon the person as occurred in that case and which made it so repugnent to the concept of ordered justice or fundamental law. Of the five justices concurring in the judgment, one did so reluctantly and solely upon the basis of *Wolf v. Colorado*, supra, which has since been over-ruled by *Mapp v. Ohio*, supra.

Another difference between the Federal courts and the Supreme Court of Errors of the State of Connecticut is the standards that each applies in determining whether or not questions asked of a witness are so innocuous and harmless that he must answer them regardless of how adversely, in his opinion, he may be harmed. The Connecticut courts hold that it will disallow the question only if it concludes that the witness has a reasonable ground to apprehend danger of criminal liability from any compulsion to answer. *McCarthy v. Clancy*, 110 Conn. 482, 488. And this view is repeated in the instant case.

The Federal courts, with and since *Hoffman v. U.S.*, 341 U.S. 479, 486, have adopted a more liberal view, holding, in effect, that the privilege against testifying should be sustained on the mere possibility of the answers being dangerous to the witness. In that case, Hoffman appeared before a Grand Jury and was asked the following:

Q What do you do now, Mr. Hoffman?

A I refuse to answer.

Q Have you been in the same undertaking since the first of the year?

A I don't understand the question.

Q Have you been doing the same thing you are doing now since the first of the year?

A I refuse to answer.

Q Do you know Mr. William Weisberg?

A I do.

Q How long have you know him?

A Practically twenty years, I guess.

Q When did you last see him?

A I refuse to answer.

Q Have you seen him this week?

A I refuse to answer.

Q Do you know that a subpoena has been issued for Mr. Weisberg?

A I heard about it in Court.

Q Have you talked with him on the telephone this week?

A I refuse to answer.

Q Do you know where Mr. Weisberg is now?

A I refuse to answer.

This Court held that he was privileged not to answer any of foregoing questions.

The following cases, among others, upheld the Hoffman case: *Aiuppa v. U.S.*, 201 F.2nd 287, wherein the witness was asked if he knew two particular persons and if he received a wire service from a particular source; *In re Neff*, 206 F.2nd 149, wherein the witness was asked if he knew certain people, if he had ever been a member of the Communist party and if he had discussed the Communist party with a Mr. Valentino; and *U.S. v. Courtney*, 236 F.2nd 921, wherein the witness was asked a series of questions designed to elicit information with respect to whom, in the course of or as an incident of his business, he paid money.

In ignoring, as it did, the Federal standard that the possibility that an answer might incriminate a witness gives him the privilege of refusing to answer, and applying the State standard that a witness must have a reasonable belief that his answer will incriminate him in order to acquire this privilege, the Supreme Court of Errors stripped this constitutional guaranty under the Fifth Amendment from the petitioner.

The tide of decisions trending towards a forthright ruling that the self-incriminatory prohibition in the Fifth Amendment should apply to State courts has achieved sufficient flood stage proportions to warrant the taking of a stand at this time. The failure to do so, especially after *Chicago, B. & Q. R. Co. v. Chicago*, supra, applying to the States another clause in the Fifth Amendment relative to the taking of private property without just compensation, and the decision in *Mapp v. Ohio*, supra, placing upon the States the obligation to observe the provisions of the Fourth Amendment against unreasonable searches and seizures, which, essentially, equates with the clause against self-incrimination in the Fifth Amendment, would be to make a mockery of our conception of logic and justice.

## CONCLUSION

In conclusion, upon the facts and law, it is respectfully urged that this Court grant this Petition for the reason that the petitioner herein will be deprived of his constitutional right not to act as a witness against himself as permitted by the Fifth Amendment, as supplemented by the Fourteenth Amendment, to the Constitution of the United States of America.

Respectfully submitted

HAROLD STRAUCH

*Counsel for the Petitioner*

## APPENDIX A

1. Sec. 1-1. Words and Phrases. In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

* * * * * *

Any crime punishable by death or imprisonment for more than one year shall be deemed a felony, and any other crime, unless designated a felony by statute, shall be deemed a misdemeanor.

* * * * * *

2. Sec. 51-35. Witness Refusing to Testify; Imprisonment. Self-incrimination. Any court may commit to jail any person legally summoned who refuses to appear and testify before it in any case, there to remain at his own expense until he so testifies; but no person shall be compelled to give evidence against himself, except as otherwise provided by statute, nor shall such evidence when given by him be used against him.

3. Sec. 52-199. Questions which need not be answered. Self-incrimination. In the conduct of any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him or to disclose his title to any property the title whereof is not material to the hearing or trial in the course of which he is interrogated, and the right to refuse to answer a question, produce a document or disclose a title may be claimed either by the party interrogated or by counsel in his behalf.

4. Sec. 53-295. Pool Selling. Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be

both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest.

5. Sec. 54-47. Investigations Into Commission of Crime. Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may

file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry.

6. Sec. 54-193. Limitation of Prosecutions for Various Offenses. No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the State Prison, except within five years next after the

offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the State Prison, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time.

7. Sec. 54-197. Conspiracy. Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

## APPENDIX B

WILLIAM MALLOY *v.* PATRICK J. Hogan, *Sheriff*

SUPREME COURT OF ERRORS

DECEMBER TERM, 1962

Judgment January 3, 1963

Announced January 22, 1963

Habeas corpus alleging unlawful imprisonment, brought to the Superior Court in Hartford County and tried to the court, *Covello, J.*; judgment for the defendant and appeal by the plaintiff. *No error.*

*Harold Strauch*, for the appellant (plaintiff).

*Harry W. Hultgren, Jr.*, with whom, on the brief, were *John D. LaBelle*, state's attorney, and *George D. Stoughton*, assistant state's attorney, for the appellee (defendant).

KING, J. On September 11, 1959, the plaintiff was arrested in a gambling raid at 600 Asylum Street, Harford, and charged, in two counts, with pool selling in violation of § 53-295 of the General Statutes. Subsequently, on November 5, he was allowed to plead nolo contendere to the first count of the information. A finding of guilty on that count was entered, and he was ordered to pay a fine of $500 and was sentenced to one year in jail, execution of the jail sentence to be suspended after ninety days of service and probation to be in effect for two years. What disposition was made of the second count of the information is not disclosed in the printed record, but the judgment file shows that a nolle prosequi was entered as to that count immedi-

ately after the imposition of the sentence under the first count.

At some time prior to January 16, 1961, the Superior Court in Hartford County, pursuant to § 54-47 of the General Statutes, entitled "Investigations into commission of crime," appointed the Honorable Ernest A. Inglis, formerly chief justice of Connecticut and then a state referee, to conduct an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee, and on January 16, 1961, Malloy, who had been so subpoenaed, appeared and was asked certain questions by the state's attorney. Most of these Malloy refused to answer on the ground that an answer would tend to incriminate him. Thereupon, the state's attorney indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of § 54-47. The referee inquired of Malloy whether he had had the advice of an attorney and he replied that he had not, since he had just received the subpoena. The referee suggested that Malloy consult an attorney before he was summoned for contempt. Apparently, contempt proceedings were not then instituted, since nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. In the meantime, he had had full opportunity to consult counsel. The questions asked him on January 25, which he refused to answer on the same claim of priviiege, were practically identical with those he had been asked on his first appearance before the referee. The questions posed on both occasions are well summarized in Malloy's brief, substantially as follows: (1) For whom did Malloy work on September 11, 1959, the date he

was arrested on the charge on which he was convicted? (2) Who selected and paid his counsel in conection with that charge and his defense thereto? (3) Who selected his bondsman and who paid him? (4) Who paid Malloy's fine? (5) What was the name of the tenant in the apartment in which he was apprehended? (6) Did he know John Bergoti?

On January 26, 1961, pursuant to § 54-47, Malloy was brought before the Superior Court and, after a hearing, was found to have failed to answer proper questions before the referee and was ordered committed to jail until he answered the questions or until the further order of the court. Malloy was thereupon committed to jail. Later in the day he made application for a writ of habeas corpus, directed to the defendant as the keeper of the jail, on the ground that the confinement in jail was illegal because it was based on a denial, in violation of the fifth amendment to the constitution of the United States and of § 9 of article first of the constitution of Connecticut, of Malloy's privilege of refusing to answer questions on the ground of self-incrimination. After a hearing on February 7, 1961, the court found the issues for the defendant and that Malloy was not unlawfully confined, and it dismissed the writ of habeas corpus. From that judgment Malloy took this appeal, his basic claim of error being that his refusal to answer the question was privileged.

The law according the privilege against self-incrimination is not open to question, but there are often difficulties in its application. The privilege is not a general one; it is, at least in all ordinary situations, to be claimed as to each question asked. *United States v. Romero*, 249 F.2d 371, 375 (2d Cir.); *Mc-*

*Carthy v. Clancy*, 110 Conn. 482, 490, 148 A. 561. It is not a prohibition against inquiry but confers an option of refusal to answer. *State v. Kemp*, 126 Conn. 60, 72, 9 A.2d 63. Our decisions from time antedating the adoption of our constitution in 1818 have consistently recognized and upheld the privilege, and it was, by § 9 of article first, incorporated in our constitution. See, for instance, *Grannis v. Branden*, 5 Day 260, 272 (a malpractice case decided in 1812); *Norfolk v. Gaylord*, 28 Conn. 309, 312 (a civil bastardy action decided over a century ago, in 1859). This section provides that an accused in a criminal prosecution "shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law." This language is very similar to that of the fifth amendment to the United States constitution, and cases interpreting the scope and application of the fifth amendment in the federal proceedings are not without persuasive force in the interpretation of our own constitutional provision. In *McCarthy v. Clancy*, supra, 488, the privilege against self-incrimination was expressly held applicable to a witness subpoenaed in a statutory investigation similar to that in which Malloy was questioned; and in *State v. Kemp*, supra, the privilege was held applicable to a witness summoned to appear before a grand jury. It is clear that Malloy was clothed with this privilege when he went before the referee, so that the only question is whether his refusal to answer was justified under the rules governing the exercise of the privilege.

On the one hand, the determination whether a question does or does not tend to incriminate a person cannot be left solely to his judgment, since he could then refuse to answer obviously innocuous questions.

On the other hand, if he were required completely to explain the precise basis for his belief that an answer to a given question would tend to incriminate him, he might well lose much, if not all, of the benefit of the privilege, since the state might utilize his explanation to obtain "leads" to evidence for future use against him. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118; *Grannis v. Branden*, supra.

The rule is well stated in *McCarthy v. Clancy*, supra, 488: "[A] witness .. .has the right to refuse to answer any question which would tend to incriminate him. But a mere claim on his part that the evidence will tend to incriminate him is not sufficient. . . . [He having] made his claim, it is then . . . [necessary for the judge] to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is reasonable ground to apprehend danger of criminal liability from his being compelled to answer. That danger 'must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection

into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Cockburn, C. J., in *Regina v. Boyes*, 1 B. & S. 311, 330; see also *Brown v. Walker*, 161 U.S. 591, 599, 16 Sup. Ct. 644 [40 L. Ed. 819]; *Mason v. United States*, 244 U.S. 362, 37 Sup. Ct. 621 [61 L. Ed. 1198]; *State v. Thaden*, 43 Minn. 253, 255, 45 N.W. 447; *State v. Wood*, 99 Vt. 490, . . . [134] Atl. 697; *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N.E. 238; 4 Wigmore on Evidence (2d Ed.) § 2271 [now 8 Wigmore § 2271 (McNaughton Rev. 1961)] Moreover, a witness called before such a tribunal as that authorized by the statute in question, against whom no accusation or proceeding is pending, could not advance such a claim as a justification for a failure to answer any question whatsoever which might be asked; for rarely would it happen that all the evidence he might give in regard to the matter under investigation would tend to incriminate him. . . . [B]efore he would be justified in refusing to answer [a given question], it must appear that there was reasonable ground to apprehend from it some real danger of incrimination. *Eckstein's Petition*, 148 Pa. St. 509, 515, 24 Atl. 63; *Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459. The same rules apply with regard to the production of documents. *Manning v. Mercantile Securities Co.*, supra, 592."

It remains to apply these principles to the questions asked Malloy. Only one question, whether Malloy knew John Bergoti, was not directly connected with, and restricted to the date of, Malloy's arrest in 1959 on the pool selling charge. Bergotti is nowhere described or in any way identified, either as to his occupation, actual

or reputed, or as to any criminal record he may have had. Indeed, the same may be said as to Malloy, except for the conviction for pool selling, which antedated his interrogation. Cf. *Hoffman v. United States*, 341 U.S. 479, 487, 71 S. Ct. 814, 95 L. Ed. 1118. Malloy made no attempt even to suggest to the court how an answer to the question whether he knew Bergoti could possibly incriminate him. That an answer might have incriminated Bergoti would be immaterial, since Malloy's privilege, such as it was, existed solely for his own personal protection and not for the protection of any other person. *Rogers v. United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344. On this state of the record the question was proper, and Malloy's claim of privilege, made without explanation, was correctly overruled. Malloy "chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none." *In re Pillo*, 11 N.J. 8, 22, 93 A.2d 176; see also, *Hoffman v. United States*, supra 489 (wherein it was held erroneous to refuse to consider explanations of a witness as to why he felt his answers to questions asked of him might incriminate him).

We turn now to the other questions asked Malloy, all of which were restricted in time and subject matter to the particular crime for which he was convicted in 1959. We need not decide whether, on their face and apart from any consideration of Malloy's immunity from prosecution, the questions should or should not have been answered in the light of his failure to give any hint of explanation as to how answers to them could incriminate him. In any event, as hereinafter pointed out, he was apparently clothed with immunity from any prosecution growing out of answers to the

questions, and he failed in any way to point out any infirmity in that immunity.

The state's attorney pointed out to Malloy that the questions were "about a matter on which you are already convicted and there can be no incrimination in that." Cf. *United States v. Smith*, 4 Day 121, 126. The referee evidently felt that no self-incrimination was involved. This is indicated by his suggestion to Malloy that he consult a lawyer before contempt proceedings were instituted. Of course, Malloy could not again be convicted of the identical crime of pool selling, and if this was the only possible danger of self-incrimination the privilege of refusal to answer would not exist. *United States v. Romero*, 249 F.2d 371, 375 (2d Cir.). However, the statute, § 53-295, under which the 1959 conviction was had, penalized a number of closely related acts, all basically concerned with pool selling, and as to many of these acts it provided that "each day of . . . [doing the act] shall constitute a separate offense." Even though Malloy could not again be tried on the identical charge on which he was convicted, he was entitled to assert his claim of privilege if there was a danger that his answers to the questions might furnish a "lead" to information which could be used to procure his conviction on a charge based on some other offense committed on the same day or on a charge based on the same or another offense committed on some other day, even the following day. See cases such as *Hoffman v. United States*, supra, 486; *Blau v. United States*, 340 U.S. 159, 161, 71 S. Ct. 223, 95 L. Ed. 170. Indeed, the second count of the 1959 information had charged the same type of pool selling on the day before the date charged in the first count, on which the conviction was had.

Where the state opposes a claim of privilege from self-incrimination on the ground of immunity from possible punishment—whether the immunity arises from a prior conviction, from the bar of a statute of limitations, from a pardon, or from any other cause—the state has the burden of proving the adequacy of the protection afforded by the immunity claimed. *United States v. Goodman*, 289 F.2d 256, 262 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75; 58 Am. Jur., Witnesses, § 84. A collection of cases illustrating the application of this general rule may be found in an annotation in 101 A.L.R. 389. Under the circumstances here, we prefer not to rest our decision on the ground that the state sufficiently sustained its burden of proving the adequacy of the immunity afforded by the 1959 conviction, considered alone.

There remains for consideration immunity arising from the bar of the Statute of Limitations. The maximum permissible penalty for any type of violation of the pool selling statute under which he was convicted (§ 53-295) was a fine of $500 and imprisonment of not over one year. Malloys crime in 1959 was, therefore, a misdemeanor and not a felony. General Statutes § 1-1. The applicable limitation was "one year next after the offense has been committed." § 54-193. That period had expired before Malloy's interrogation in 1961. The referee's hearing was, in fact, more than a year after the conviction of Malloy and the disposition of the criminal case on November 5, 1959. It is true that the operation of the Statute of Limitations is suspended during periods in which the person charged "fled from and resided out of this state." But Malloy made no claim that he was without the state for any period. In his habeas corpus application, and also at the hearing

before the referee, he gave his residence as Windsor, Connecticut. His 1959 arrest was in Hartford. Under these circumstances, there would be no inference that he was at any time without the confines of the state so as to toll the Statute of Limitations. If at the hearing before the referee Malloy relied on absence from the state to toll the statute, he would have had to advance that claim in order to have it considered by the court on the question of the adequacy of the immunity from punishment provided by the Statute of Limitations. Nothing of this kind was attempted. Under the facts here, we do not feel that the burden was on the state, at least in the first instance, of negating the naked possibilty that the Statute of Limitations was tolled under the exception quoted above. See *State v. Lee*, 69 Conn. 186, 199, 37 A. 75. If, and to the extent that, cases such as *People v. Rockola*, 339 Ill. 474, 477, 171 N.E. 559, would require a holding to the contrary in this particular case, we cannot follow them.

Malloy did suggest that on a felony charge—what felony charge he did not specify—the applicable limitation would be five years. See General Statutes § 54-193; *In re Pillo*, 11 N.J. 8, 21, 93 A.2d 176. As far as appears, the only criminal activity in which Malloy had ever engaged was the misdemeanor of pool selling, and this only in September, 1959. There is nothing to indicate any danger to Malloy of a prosecution for any felony. Malloy also mentioned before us, a possible prosecution for conspiracy to commit some unspecified crime, and something was made of the fact that the Statute of Limitations on a continuing conspiracy does not start to run until the last overt act is committed. *State v. Kemp*, 126 Conn. 60, 85, 9 A.2d 63. There is nothing to suggest a continuing conspiracy. Nor is

there anything to indicate any possible danger to Malloy of a prosecution for any conspiracy other than perhaps a conspiracy to violate the pool selling statute. For such a conspiracy, the limitation is but one year, since it is the same for a conspiracy to commit a misdemeanor as for the misdemeanor itself. General Statutes § 54-197. In all this, Malloy confounds vague and improbable possibilities of prosecution with reasonably appreciable ones. Under claims like his, it would always be possible to work out some finespun and improbable theory from which an outside chance of prosecution could be envisioned. Such claims are not enough to support a claim of privilege, at least where, as here, a witness suggests no rational explanation of his fears of incrimination, and the questions themselves, under all the circumstances, suggest none.

Although the claim was not made by Malloy, it is true that the state did not prove, as clearly as would have been desirable, that there was no prosecution of any sort actually instituted and outstanding against Malloy to which the Statute of Limitations would not be an effective bar. *United States v. Goodman*, 289 F.2d 256, 263 (4th Cir.), cert. granted, 368 U.S. 14, 82 S. Ct. 127, 7 L. Ed. 2d 75. That there was no such prosecution was, however, implicit in the statement of the state's attorney to Malloy that he could not be incriminated by answering the questions, and Malloy makes no claim that there was any such prosecution. Under all the circumstances, and in the absence of any hint of explanation from Malloy, we do not think that it is necessary, in this particular case, to reverse the court below because the state went no further in its evidence on this point.

The fifth amendment does not apply, as such, to state courts. *Cohen v. Hurley*, 366 U.S. 117, 118 n.1, 81 S. Ct. 954, 6 L. Ed. 2d 156. However, the fourteenth amendment, in its guarantee of due process, probably does prohibit a state court from so ruling on a claim of privilege from self-incrimination as to violate the fundamental concepts of justice and a fair trial. Ibid.; *Adamson v. California*, 332 U.S. 46, 51, 67 S. Ct. 1672, 91 L. Ed. 1903. But as already pointed out, Malloy did not, in respect to any of the questions he refused to answer, bring himself within the settled rules defining the right to assert a privilege against self-incrimination. Thus there could be no violation of due process, and there was no error in Malloy's commitment for contempt.

There is no error.

In this opinion the other judges concurred.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 110

WILLIAM MALLOY

*Petitioner,*

*—versus—*

PATRICK J. HOGAN
Sheriff of Hartford County,

*Respondent.*

JOHN D. LABELLE
*State's Attorney*
*for Hartford County*
Hartford, Connecticut

GEORGE D. STOUGHTON
*Assistant State's Attorney*

HARRY W. HULTGREN, JR.
*Assistant State's Attorney*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

WILLIAM MALLOY
*Petitioner,*

*v.*

PATRICK J. HOGAN
Sheriff of Hartford County,
*Respondent.*

No. .....

It has been previously decided the Fifth Amendment of the U. S. Constitution applies to federal cases and not state cases.

*Twining v. New Jersey*, (1908), 211 U.S. 78.

Any case involving self-incrimination necessarily are *ad hoc* decisions. The limits have been fairly defined.

*United States v. Romero* (2nd Cir. 1957), 249 F. 2d 371.
*Brown v. Walker* (1895), 161 U.S. 597.
*Kuna v. United States* (1960), 364 U.S. 507, 513.
8 *Wigmore, Evidence* (McNaughton Rev. 1961) Sec. 2779, p. 481.

A state has a wide reach in applying privilege against self-incrimination.

*Cohen v. Hurley* (1961), 366 U.S. 117.

The questions involved in this case are not self-incriminatory and assumption of counsel for petitioner is gratuitous.

It is submitted there is no denial of due process and no conflict with the federal decisions. It is urged the petition be denied.

*Respondent*

By Harry W. Hultgren, Jr.
*Assistant State's Attorney*

This is to certify a copy of the above was delivered to counsel for petitioner, Harold Strauch, 234 Pearl Street, Hartford 3, Connecticut on May 16, 1963.

Signed Harry W. Hultgren, Jr.
*Assistant State's Attorney*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 110

WILLIAM MALLOY,

*Petitioner,*

*—versus—*

PATRICK J. HOGAN,
Sheriff of Hartford County,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

## BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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## BRIEF FOR PETITIONER

---

### STATEMENT OF THE CASE

On September 11, 1959, as the result of a general raid that was conducted in the Hartford area of the State of Connecticut by the police departments of the State of Connecticut and the City of Hartford, the Petitioner, along with others, was arrested in an apartment at 600 Asylum Avenue, Hartford. (R 6, 9, 16, 27)

He was found guilty of poolselling, fined five hundred dollars, and he was given a one-year sentence in the County jail. The sentence was ordered to be suspended after 90 days, at which time he was to be placed on probation for two years. (R 6, 17, 27).

Thereafter, on January 16 and 25, 1961, the Petitioner was subpoenaed to appear before the Honorable Enest A. Inglis, who was conducting an investigation to determine whether there was probable cause to believe that crimes, including gambling, were committed in Hartford County. (R 7, 17, 27).

On both days, the Petitioner answered several questions, but he refused to answer the following questions that were posed by the State's Attorney: (1) For whom did he work on September 11, 1959; (2) Who selected and paid his counsel in connection with his arrest on September 11, 1959, and his subsequent appearances in court due to said arrest; (3) Who selected and paid his bondsman; (4) Who paid his fine; (5) The name of the tenant of the apartment in which he was apprehended; and (6) Did he know one John Bergoti. (R 7, 8, 9, 10, 17, 18, 19, 20, 27, 28).

His refusal to answer the aforesaid propounded questions was due to an unwillingness to be a witness against himself, believing that any answer by him would be incriminating and that he was protected in his refusal by the Fifth Amendment to the Constitution. (R 7, 8, 9, 10, 17, 18, 19, 20, 28).

In time, he was held to be in contempt. (R 10, 28). He appealed to the Supreme Court of Errors of the State of Connecticut from the judgment of the lower court, dismissing an application for a writ of habeas corpus to release him from jail, to which he had been committed because of his refusal to answer the aforesaid questions. (R 14, 28).

The lower court held that the Fifth Amendment was not applicable on the ground that it was restricted to federal proceedings only. (R 10, 21). It also held

that the Petitioner's assertion that any answer by him would tend to incriminate was inadequate, as it was for the court to determine, from the circumstances of the case and the nature of the evidence sought from the Petitioner, whether there was reasonable basis to apprehend danger of criminal liability by any compulsory answer. (R 11, 21). It concluded that the questions asked of the Petitioner evinced no real, appreciable danger to him and that, therefore, the writ of habeas corpus should be dismissed. (R 12, 21).

The Supreme Court of Errors of the State of Connecticut upheld the findings and rationale of the lower court, including, among others: (a) that the assertion that the answering of the questions would be incriminating is not enough, but that a court, before granting the privilege of not answering, must reasonably conclude, from the circumstances of a particular case, that criminal liability will result, ignoring the crucial factor that any explanation for the refusal to testify would result in the giving of the incriminating evidence that was being sought by the interrogation, and (b) that the Fifth Amendment does not apply to state proceedings. (R 35).

## SUMMARY OF ARGUMENT

By virtue of the case of *Mapp v. Ohio*, 357 U.S. 643, this Court held for the first time that the provisions of the Fourth Amendment against unreasonable searches and seizures is enforceable against the States through the Due Process Clause of the Fourteenth Amendment.

Inasmuch as the Fifth Amendment is indissolubly entwined with the Fourth Amendment as complementary and equal entities in the Bill of Rights, (*Boyd v.*

*U.S.*, 116 U.S. 616, 630-635; *Bram v. U.S.* 168 U.S. 532, 543-545; *Brown v. Walker*, 161 U.S. 591, 596, 606), it logically follows that the provision of the Fifth Amendment protecting any person in a criminal case from testifying against himself should be extended likewise by the Fourteenth Amendment to cover State proceedings, as it does Federal proceedings.

If it is held that the Fifth Amendment, as supplemented by the Fourteenth Amendment, is applicable to State proceedings, it follows then that the propriety of the questions directed to the Petitioner, to which he objected on the ground of incrimination, should be determined by the constitutional standards implicit in the Fourteenth Amendment, rather than by the standards pursued by the State of Connecticut. *Rogers v. Richmond*, 365 U.S. 534, 543-545; *Mapp v. Ohio*, supra; *Ker v. California*, 10 L. ed 2nd 726, 735, 736.

The finding of the Supreme Court of Errors of the State of Connecticut that the questions asked of the Petitioner as set forth in the Statement of the Case, supra, were harmless as the answers thereto would not incriminate, flowed from its standard that all questions must be answered unless it can be *reasonably* concluded, from the circumstances of the particular case, that criminal liability will result. (emphasis added). By adherence to this standard, it violated the milder less-demanding federal standards, holding that the privilege against testifying should be sustained on the *mere possibility* of the disclosure being incriminating or dangerous to the witness. (emphasis added). 1 *Burr's Trial*, 244; *Hoffman v. U.S.*, 341 U.S. 479, 490; *U.S. v. Doto*, 205 F. 2nd 416; *U.S. v. Coffey*, 198 F. 2nd 438, 440, 441; *Maffie v. U.S.*, 209 F. 2nd 225.

## ARGUMENT

### I

### The Fifth Amendment, As Supplemented By The Fourteenth Amendment, Applies To State Proceedings.

In the determination of whether or not the Fifth Amendment, supplemented by the Fourteenth Amendment, applies to State proceedings, a brief statement of the judicial history of the Bill of Rights, with special stress upon the Fourth Amendment, is relevant and in order.

Starting with the case of *Barron v. Baltimore*, 7 Peters 243, 8 L. ed. 672, it was held that none of the first eight Amendments in the Bill of Rights was applicable to the States, resulting in the dismaying development of two separate and conflicting standards of constitutional adjudication.

This judicial concept continued beyond the adoption of the Fourteenth Amendment in 1868 and the case of *Twining v. New Jersey*, decided in 1908, 211 U.S. 77, and until the 1920's, when a shift from this position, which has been growing stronger steadily, took place.

As a result of this shift, this Court has ruled: (a) that the First Amendment must be observed by the States (*Gitlow v. New York*, 268 U.S. 652, 666; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 633; *DeJonge v. Oregon*, 299 U.S. 353, 364;

*Bridges v. California*, 314 U.S. 252, 277; *Palko v. Connecticut*, 302 U.S. 327); (b) that the requirement of the Fifth Amendment that just compensation shall be paid for private property taken for public use must be observed by the States (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 240-241); (c) that the requirement of the Sixth Amendment that an accused shall have the assistance of counsel for his defense must be observed by the States (*Powell v. Alabama*, 287 U.S. 45, 68-69; *Carnley v. Cochran*, 369 U.S. 506); and (d) that the requirement of the Fourth Amendment against unreasonable searches and seizures must be observed by the States. (*Mapp v. Ohio*, supra; *Ker v. California*, supra).

These decisions, which, of course, are reconsiderations of former decisions of this Court, are the product of: (a) a keener awareness and appreciation of the history that prompted the introduction and passage of the Bill of Rights; (b) a more mature comprehension of the breadth and extension of the first eight amendments of the Bill of Rights; (c) a broader understanding of the full import of the Fourteenth Amendment and the basic, personal rights protected by its "privileges or immunity" and its "due process of law" clauses; and (d) a continuing construction of the Constitution, consistent with its fundamental guarantees, to enable it to adjust to the "needs both of continuity and of change, in a progressive society."

Although this Court held, until relatively recent years, that the first eight amendments were not effective against the States, it now holds, as noted earlier, that at least some of these amendments must be observed by them. Whether this change came about through a theory of the incorporation of the Bill of

Rights by the Fourteenth Amendment, or the application of the privileges or immunities clauses of the Fourteenth Amendment, or the application of the Due Process Clause of the Fourteenth Amendment, or by the process of absorption through the Fourteenth Amendment that is grounded on the belief that neither liberty nor justice would exist, if these constitutional guarantees were denied in any forum, isn't too important. What is of moment is the current cognizance that these guarantees are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "of the essence of the scheme of ordered liberty" that the judgment of the State Court in this case, that the Petitioner must incriminate himself, is so opposed to these ideas as to warrant a reversal.

It is submitted that the *Mapp* and the *Ker* cases, which forthrightly declared that the Fourth Amendment is enforceable against the States by the same sanction of exclusion as is used against the Federal government, are persuasive precedents for the claim that the Fifth Amendment should similarly be declared enforceable against the States, particularly in the light of *Boyd v. U.S.*, supra; *Brown v. Walker*, supra; *Bram v. U.S.* supra; and *Weeks v. U.S.*, 232 U.S. 383, each of which found that the Fourth and Fifth Amendments were so intertwined as to be complementary. On this basis, no reason exists for a refusal to give to the Fifth Amendment the same interpretation, validity and enforcement as are given to the Fourth Amendment. Certainly, to claim that too long a line of precedents exists to permit this to be done is not the answer. Were it so, the *Mapp* case would have been decided otherwise, for it, too, broke with precedents of long, long standing.

Implicit in the Fifth Amendment are values that equate with those in the First, Fourth and Sixth Amendments, all of which have been declared to be applicable to the States. It follows then that the Fifth Amendment must also be held to embody the same "fundamental principles of liberty and justice which lie at the base of . . . our civil and political institutions," as do these other amendments.

## II

**The Fourteenth Amendment Imposes Restrictions Upon The States In Criminal Matters By An Insistence Upon The Use Of Federal Constitutional Standards Of Due Process In Lieu Of Their Own Standards Or Concepts Of Due Process.**

Whenever an amendment to the Constitution of the United States is declared to be effective against the States, there is an incidental, correlative finding that a State Court, in its decision, must be governed by the federal constitutional standards and the decisions of this Court in applying and construing the amendment.

The following citations, which are believed to be adequate to illustrate the point, establish this to be correct:

(a) *Ker v. California*, Pgs. 735-736, 738. (supra).

"In Mapp v. Ohio, 367 U.S. at 646, 647, 657, we followed Boyd v. United States, 116 U.S. at 616, 630, which held that the Fourth Amendment, implemented by the self inerimination clause of the Fifth, forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. We specifically held in Mapp that this constitutional

prohibition is enforceable against the States through the Fourteenth Amendment. This means, as we said in Mapp, that the Fourth Amendment "is enforceable against them (the states) by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting "unreasonable searches and seizures." . . . We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here . . . While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental - i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

(b) *Mapp v. Ohio*, Pgs. 654-656, 685. (supra)

"We hold that all evidence obtained by searches

and seizures in violation of the Constiution is, by that same authority, inadmissible in a state court . . . Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Proces Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal —it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure . . . Federal-State cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."

(c) *Rogers v. Richmond*, 365 U.S. 534, 540.

"A critical analysis of the Connecticut proceedings leads to disposition of the case on a more

immediate issue. For it compels the conclusion that the trial judge in admitting the confessions as "voluntary," and the Supreme Court of Errors in affirming the conviction into which the confessions entered, failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession.

Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accustorial and not an inquisitorial system, a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

## III

### The State Standards That Were Applied In This Case Were More Rigorous Than, And Not In Conformity With, The Federal Standards of Due Process.

The State court had adjudged that the Petitioner was clothed with the privilege against self-incrimination, at least by its constitution, (R 28-29), but that, nevertheless, the questions asked of him (R 7-10, 17-20, 28) had to be answered as, to do so, would not violate state precedents on this subject, nor the provisions of the Fifth Amendment, nor due process under the Fourteenth Amendment. (R 35). It used the following standards as its guide lines in determining that the Petitioner would not incriminate himself:

a) Whether a question does or does not tend to incriminate cannot be left *solely* to the witness' judgement, since he could then refuse to answer obviously innocuous questions. (R 29).

b) A mere claim that the evidence will incriminate is not sufficient. (R 29-30).

c) After a witness claims the privilege, it becomes necessary for the Judge to determine in the exercise of a legal discretion whether, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, there is *reasonable* ground to apprehend danger of criminal liability from compulsion to answer. (R 30).

d) The danger to the witness must be *real and appreciable*, with reference to the ordinary operations of law in the ordinary course of things. (R 30).

e) A *merely remote and naked possibility*, out of the ordinary course of law and such as no *reasonable* man would be affected by, should not be suffered to obstruct the admission of justice. (R 30).

Assuming for the moment that there is accord that the Fifth and Fourteenth Amendments apply in this case, it is urged that the State standards are too high and too drastic to conform to the far less rigorous requirements of the Due Process Clause as set forth in the leading case of *Hoffman v. U.S.*, 341 U.S. 479, in which were established the following principles in determining the self-incriminating quality of so-called innocuous questions:

a) The "link in the chain" of evidence rule, as first announced in *Blau v. U.S.*, 340 U.S. 159, was reiterated and followed.

b) The witness' own declaration that the question is incriminating is insufficient to invoke the privilege.

c) The witness should not be compelled to prove the incrimination so as to destroy his protection.

d) The Court, in deciding the applicability of the privilege, should consider external circumstances.

e) The privilege should be sustained on the *mere possibility* of the disclosure being dangerous.

Other cases, following the spirit of the *Hoffman* case, are *U.S. v. Doto*, 205 F. 2nd 416; *U.S. v. Coffey*, 198 F. 2nd 438, holding that "in a determination whether a witness really apprehends danger in answering the question, the Judge cannot permit himself to be skeptical, rather must he be acutely aware that, in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry"; *Isaacs v. U.S.*, 256 F. 2nd 658, holding that "to warrant a denial of the privilege, it must appear in the setting in which the question is asked that the answer *cannot possibly have a tendency to incriminate*"; and *Maffie v. U.S.*, 209 F. 2nd 225.

Even a cursory comparison of the two sets of standards reveals a substantial and critical difference between them — to the degree that the State's standards, especially at this junction in world events when the importance of the concept of a free people in a democratic society, with their unique personal rights and privileges, was never greater, is shocking to the conscience and justifies the intervention of this Court on constitutional grounds.

As to the contention of the State court that the Petitioner, whose conviction more than a year earlier

was for a misdemeanor, could not be prosecuted because of his answers as an existing one year statute of limitations in matters of misdemeanors would protect him (R 33), it can be said safely that this is a most unsophisticated approach. To conclude that a person, involved with many others in a field of criminal activity, necessarily limited himself to the commission of misdemeanors and had not, under any circumstances committed or shared in a felony, is too naive to be given any standing. And the statute of limitations for felonies is five years.

While the Record does not show definitely the size of the catch that was brought in by the 1959 police raid, one can reasonably assume from what there is therein that the haul was significant. In any event, the Record does disclose that at least two other persons were arrested with the Petitioner in that episode. (R 24-27). From this fact and the fact that he was engaged in criminal activity, it would seem *reasonable*, even by the standards of the State court, that the persons sought to be identified by the Petitioner could give testimony that might well involve him in a prosecution. Otherwise, there would be no sense to the questions posed to the Petitioner. And, at the very least, it is not amiss to assume that an experienced State's Attorney did not ask frivolous or harmless questions on this occasion.

## CONCLUSION

The *Mapp* case cleansed a smudge from the escutcheon of Justice when it prohibited the States from the obnoxious practice of unreasonable searches and seizures, and made one's home again the sanctuary that it was guaranteed to be by the constitution.

Another smudge can be removed by a reversal of the decision of the State court in this case, which is as momentous as, and conceptually linked with, the *Mapp* case. The right to become untrammeled in this area of constitutional guarantees is of no less standing and validity than in *Mapp*.

Respectfully submitted,

HAROLD STRAUCH
Attorney for the Petitioner

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IN THE

# Supreme Court of the United States

October Term, 1963

No. 110

WILLIAM MALLOY,

*Petitioner,*

v.

PATRICK J. HOGAN,
Sheriff of Hartford County,

*Respondent.*

On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut

## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

---

### Interest of *Amicus*

The American Civil Liberties Union is a private nonpartisan organization engaged solely in the defense of the Bill of Rights. Our interest in the case at bar revolves around the due process of law, specifically, the Fifth Amendment privilege against self-incrimination and its application to the states through the Fourteenth Amendment.

We believe that the privilege should be held applicable to the states as part of the "fundamental law" of our nation. Due process requires nothing less than that *Twining* v. *New Jersey*, 211 U. S. 78 (1908) be overruled.[a]

---

[a] This brief is filed with consent of the parties on file in the Office of the Clerk.

## Statement of Facts

In September 1959, petitioner was found guilty of pool selling, fined one hundred dollars and given a one-year jail term which was ordered suspended after ninety days. Petitioner was placed on probation for two years (R. 6, 17, 27).

In January 1961, petitioner was subpoenaed to testify before a referee appointed by the Hartford County Superior Court to investigate gambling (R. 7, 17, 27). Petitioner answered some questions but refused to answer others on grounds of self-incrimination (R. 7-10, 17-20, 27, 28). He was held in contempt. On appeal, the Connecticut Supreme Court of Errors affirmed the lower court's findings that the Fifth Amendment privilege does not apply to state proceedings and that the assertion of incrimination is insufficient, but that a court, before allowing the privilege, must reasonably conclude from all the facts that criminal liability would follow (R. 35).

## ARGUMENT

### I

### The Fifth Amendment privilege against self-incrimination is part of the due process embraced by the Fourteenth Amendment.

#### A. A proper reading of history reveals that the privilege against self-incrimination was regarded as a fundamental right at the time the Constitution was adopted.

When the barons wrested Magna Carta from King John at Runnymede in 1215, they won the guarantee that "No freeman shall be taken and imprisoned * * * nor will we go upon him or send upon him, except by the lawful judgment of his peers and by the law of the land." "By the law of the land"—*per legem terrae*—has been adopted in our own Constitution as "due process of law." The

Supreme Court of Errors of Connecticut has acknowledged that to deprive a man of fundamental privileges guaranteed by the law of the land is to deprive him of "due process of law" (R. 35). Hence an inquiry is necessary whether the privilege against self-incrimination is part of our fundamental law.

A majority of the Court in *Twining* v. *New Jersey*, 211 U. S. 78 (1908), concluded that the privilege was not so established when our Constitution was adopted. Mr. Justice Harlan, in dissent, read history quite differently. He found that the right not to be compelled to be a witness against oneself was a right long at the center of the Englishman's concern, hard won after centuries of struggle, and a right especially prized by settlers who fled to this country.

It is true, of course, that the privilege against self-incrimination was not always established, just as the concept of "the king in Parliament" was not always established. Both notions of government had to be fought for, and this, indeed, demands all the more that they should not be lightly disregarded. The inquisitorial procedures of the ecclesiastical courts, with the rack and the screw, whose slightest suggestion in this country "shocks the conscience",[1] long disturbed both the bodies and the brows of Englishmen. But by the sixteenth century dissatisfaction with such procedures grew so great as to take the shape of the maxim, "Nemo tenetur prodere se ipsum"—no one should be required to accuse himself. The future Lord Chief Justice Coke won relief against the inquisitorial proceedings of the ecclesiastical courts, *Cullier and Cullier*, Cro. Eliz. 201 (1589).[2]

On the secular side we find compulsion to give evidence against one self continuing into the seventeenth century, when, in 1637, the famous Leveller, "Freeborn John" Lil-

[1] *Rochin* v. *California*, 342 U. S. 165 (1952).

[2] See, Griswold, "The Fifth Amendment Today," p. 2 (Cambridge, 1955).

burne, was ordered tortured by the Star Chamber for his refusal "to take a legal oath" and "answer truly" against himself.[3] But in 1641, Parliament reversed this judgment and decreed that Lilburne's punishment was "illegal" and against the "liberty of the subject."

Abolition of the notion that a man might be compelled to produce evidence against himself did not take hold immediately upon Lilburne's courageous stand against the Star Chamber. In commenting on the adoption of Magna Carta's "per legem terrae" into the Fifth Amendment's provision that "No person shall . . . be deprived of life, liberty or property without due process of law", Dean Griswold quotes the words of Dr. Mott:[4]

> "This portion of the Fifth Amendment may thus be regarded as containing phraseology of purest gold mined under the stress of heated constitutional crises, refined by the fire of violent revolutions, proved by the acid test of centuries of struggle and molded by the hand of one of America's greatest constitutional draftsmen (Madison)."

The majority of the Court in *Twining*, in ruling that the privilege was not firmly established either in England or this country at the time of The Mayflower, seems to make much of the fact that Governor Winthrop of Massachusetts, in the trial of Anne Hutchinson as a witch in 1627, was "not aware of any privilege against self-incrimination or conscious of any duty to respect it," 211 U. S. at 103-104. But as Justice Black, dissenting in *Adamson* v. *California*, 332 U. S. 46 (1947), points out, the narrowly orthodox are seldom convinced that the unorthodox have any rights:

> "The lamentable experience of Mrs. Hutchinson and others, contributed to the overwhelming sentiment that demanded adoption of a constitutional Bill

[3] *Id.* p. 3.

[4] *Id.* pp. 35-36, quoting Mott, R. L., "Due Process of Law," (Indianapolis, 1926).

> of Rights. The founders of this government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and all public officers of a power to compel people to testify against themselves. See Pittman, at 789".[5]

Indeed, Massachusetts, in its Constitution of 1780, was one of the first states to provide that "no subject shall be * * * compelled to give evidence against himself, in a court of criminal law." Suffice it to say that by the time the Federal Constitution was adopted in this country, the rights of both the English and American people were on a far different footing than in the days of the Star Chamber and the witchcraft trial of Anne Hutchinson.

The majority in *Twining* was also disturbed by the fact that when the states (except for New Jersey and Iowa) drew up their own constitutions, the privilege against self-incrimination was set forth separately from and in addition to the "due process" clause. The *Twining* Court drew the inference that such separate enumeration meant that the privilege against self-incrimination was not thereby "fundamental in due process of law, nor an essential part of it."[6] But exactly the opposite inference may be drawn, namely, that the states considered the privilege against self-incrimination so essential that they spelled it out in their constitutions. As the first Mr. Justice Harlan noted in his dissent in *Twining*:

> "If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren

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[5] 332 U. S. at 88-89. The reference is to Pittman, "The Colonial and Constitutional History of the Privilege against Self-Incrimination," 21 Va. L. Rev. 763 (1935).

[6] 211 U. S. at 119.

> of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its convention of May, 1776—in advance, be it observed, of the Declaration of Independence—made a Declaration * * * which set forth certain rights as pertaining to the people of that State * * * 'as the basis and foundation of government.' Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself." 211 U. S. at 119-120.

**B. Even if an analysis of history leads the Court to conclude that the privilege against self-incrimination was not a fundamental right at the time the Federal Constitution was adopted, it is clear that the framers of the Fourteenth Amendment intended that Amendment to make the Bill of Rights binding on the states.**

Amicus' reading of history concurs with Mr. Justice Harlan in his *Twining* dissent and Dean Griswold in "The Fifth Amendment Today". We believe with them that, at the time the Federal Constitution was adopted, the notion that a man should not be compelled to incriminate himself was firmly embraced by the concept of "due process of law". In this connection we have seen that constitutional history can be subject to two quite different readings. But even if the reading of history in the majority opinion in *Twining* is affirmed by this Court, it is at least clear that at the time of the adoption of the Fourteenth Amendment in 1866, the framers of that Amendment intended the privilege against self-incrimination, as found in the Bill of Rights, to apply against the states. A most illuminating discussion of the intent of the framers of the Fourteenth Amendment is to be found in the Appendix to Justice Black's dissent in *Adamson*, 332 U. S. at 92.

Congressman Bingham, the member of the Reconstruction Committee who presented the Amendment to the House of Representatives, was under the impression (as was the

majority later in *Twining*) that the privilege against self-incrimination and the Bill of Rights were not binding on the states. In fact, he believed that such a state of affairs had been a major source of the difficulties between the states:

> "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every state, by congressional enactment, to enforce obedience to these requirements of the Constitution [i.e., the Fifth Amendment]. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every state, that rebellion, which has scarred and blasted the land, would have been an impossibility."[7]

Some members of Congress took issue with Congressman Bingham. They said that the Bill of Rights was already binding on the states.[8] Nonetheless, Congressman Bingham was insistent that the Supreme Court's decision in *Barron* v. *Baltimore*, 7 Peters 243 (1833), had made it evident that the Federal government could not enforce the provisions of the Fifth Amendment against the states. It should be carefully noted in this connection that *Twining* rested in large measure upon the earlier authority of *Barron* v. *Baltimore*.

Congressman Bingham insisted that the result of the *Barron* case be overturned:

> "The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of the states for violation of the oaths enjoined upon them by the Constitution * * * Is the Bill of Rights to stand in our Constitution hereafter, as in the past five years within eleven states, a mere dead

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[7] Cong. *Globe*, 39th Cong., 1st Sess, 1033-34 (1865).

[8] *Id.* at 1059, 1066, 1088.

> letter? It is absolutely essential to the safety of the people that it should be enforced.''[9]

Justice Black tells us that Kendrick, an important writer on the adoption of the Fourteenth Amendment, observed that '' 'Bingham's speech in defense and advocacy of his amendment comprehends practically everything that was said in the press or on the floor of the House in favor of the resolution' ''.[10]

In placing the proposed amendment before the Senate, on May 23, 1865, Senator Howard spoke as follows:

> ''I * * * present to the Senate * * * the views and the motives [of the Reconstruction Committee] * * * The first section of the amendment * * * relates to the privileges and immunities of citizens of the several states, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States * * * [Senator Howard discussed the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution]. *To these privileges and immunities * * * should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution * * * The great object of the first section of this (the Fourteenth Amendment) is, therefore, to restrain the power of the States and compel them at all times to respect these fundamental guarantees.*''[11]

**C. In addition to the historical evidence presented above, the decisions of this Court indicate that the Fifth Amendment guarantee of the privilege against self-incrimination should apply to the states.**

In his dissenting opinion in *Adamson*, Mr. Justice Black points out a long line of dissenting opinions of this Court

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[9] *Op. cit.*, at 1089-91.

[10] 332 U. S. at 98, quoting Kendrick, "Journal of the Joint Committee on Reconstruction," 217 (1914).

[11] Cong. *Globe*, *supra* at 2765. (Emphasis added.)

which argued that the Bill of Rights should be deemed to apply to the states through the Fourteenth Amendment. He suspects the reasoning of the *Twining* majority; he believes it can be read, not only as giving leeway to the states to disregard the provisions of the Bill of Rights, but also as potentially allowing this Court to place great restraints upon state power. He fears giving this Court the power to determine from time to time what should be the "fundamental rights" which are to be protected against state infringement by the "due process" clause of the Fourteenth Amendment. At one time, as is the case in *Twining*, far less than the enumerated protections of the Bill of Rights may be thought granted to the citizens of the several states; at another time far more than these minimum protections may be deemed necessary to protect individual citizens against state action. It is Justice Black's purpose to stabilize the law—to make the guarantees of the Bill of Rights inviolate against state infringement on the one hand, and, conversely, prevent the courts from going too far the other way.

Whether for good or ill, the fact remains that this Court's approach towards what should be the content of the Fourteenth Amendment has not been stable. In a separate dissent in *Adamson*, Mr. Justice Murphy voiced the opinion that while the guarantees of the Bill of Rights against state action should be regarded as a minimum, a floor below which the states cannot go in determining what fundamental liberties are protected by "due process":

> "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." [12]

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[12] 332 U. S. at 124. Some parts of the Fifth Amendment have already been held to apply to the states. Property cannot be taken without just compensation. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

In the main, this Court's approach to the problem of which rights are deemed so fundamental that any abridgement would, *ipso facto*, be a denial of "due process" has taken the form of selective supplementation from the Bill of Rights. Mr. Justice Moody, speaking for the Court in *Twining*, looked at the matter thus:

> "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. 'That * * * would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' *Holden* v. *Hardy*, 169 U. S. 366, 388 * * * " 211 U. S. at 101.

Mr. Justice Frankfurter took a similar view:

> "Here we are concerned with the requirement of 'due process of law' in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expressed a demand for civilized standards of law. It is not thus a stagnant formulation of what has been achieved in the past, but a standard for judgment in the progressive evolution of a free society." *Malinski* v. *New York*, 324 U. S. 401, 414 (1944).

Indeed, it is clear from recent decisions of this Court, that the flexible approach to "due process of law" has led to improvement and more "civilized standards" of law. This is especially so in the area under consideration in the instant case. If any evolution can be recognized, it can most certainly be noted in the disposition of the Court to find the guarantees of the Bill of Rights binding upon the states. Provisions of the Bill of Rights which were not formerly deemed basic to the concept of "ordered liberty" are now

considered "fundamental rights" within the protection of the due process clause of the Fourteenth Amendment.

One of these notable decisions is *Mapp* v. *Ohio*, 367 U. S. 643 (1960). *Mapp* held that evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court, thus overruling *Wolf* v. *Colorado*, 338 U. S. 25 (1948). Just as *Mapp* made the Fourth Amendment guarantees against unreasonable searches and seizures applicable to the states, so did *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), make the Sixth Amendment guarantee of the right to counsel applicable to the States. In that case also, a former decision of this Court, *Betts* v. *Brady*, 316 U. S. 455 (1942), which did not recognize the right to counsel as a "fundamental right", was overruled. In his concurring opinion in *Gideon*, Mr. Justice Douglas said:

> "While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten justices have felt that it protects from infringement by the states the priviliges, protections, and safeguards granted by the Bill of Rights.
>
> "Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil* v. *Vermont*, 144 U. S. 323, 362-363, 370-371, as did Justices Black, Douglas, Murphy and Rutledge in *Adamson* v. *California*, 332 U. S. 46, 71-72, 124. * * * That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 118-119, 122 * * *.
>
> "[the view that a guarantee of the Bill of Rights made applicable to the states by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal government] has not prevailed and rights protected against state invasion by the Due Process clause of the Fourteenth

Amendment are not watered-down versions of what the Bill of Rights guarantees." 372 U. S. at 345-6.

It is significant that *Mapp* made much of the close interrelationship between the Fourth and Fifth Amendments. Mr. Justice Black said:

> "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar [the incriminating evidence] * * * Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.
>
> "The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem, has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*. There the Court fully discussed this relationship and declared itself 'unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself'. It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case * * * its force has for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd* doctrine * * * is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case:
>
> "'[C]*onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy*, and leads to gradual deprecia-

> tion of the rights, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" 367 U. S. at 661-63 (emphasis added).

In "The Fifth Amendment Today," Dean Griswold says that the privilege against self-incrimination is "one of the great landmarks in man's struggle to make himself civilized".[13] We have noted earlier that one of the chief reasons (according to Mr. Justice Frankfurter) for keeping the concept of "due process" flexible was the demand for "civilized standards of law".[14] As our civilization advances, our respect for the necessity of procedural safeguards increases.

*Boyd* and *Mapp* set forth the close link between the Fourth and Fifth Amendments. The essence of that link is a respect for the right of privacy of the individual.

As this Court said in *Boyd*, when it announced that the Fourth and Fifth Amendments run "almost into each other," the doctrines of those Amendments

> "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers be used as evidence to convict him of crime * * * is within the condemnation * * * [of those Amendments]." 116 U. S. at 630.

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[13] Griswold, "The Fifth Amendment Today," p. 7.

[14] *Malinski* v. *New York*, 324 U. S. 401, 414.

The rationale of *Mapp* was that "a man's home is his castle." To be sure, if the police were allowed to conduct unreasonable searches and seizures, much relevant and highly reliable evidence might be turned up against many of our citizens. Likewise the objection to coerced confessions is not due primarily to their lack of reliability. Rather, by holding the fruits of unreasonable searches and seizures and confessions coerced by state officers inadmissible, this Court has intended to achieve the independent objective of insuring more civilized procedures in law enforcement. For proper procedures are of the essence. As Justice Frankfurter has said, "The history of liberty has largely been the history of observance of procedural safeguards".[15]

The ends of criminal justice cannot be separated from the means used to achieve those ends. Formerly men were tortured in order to compel them to confess. One wonders, however, whether there is an essential difference if the punishment comes afterwards, rather than before, in the form of a jail term for contempt. And if a man's home, being his castle, is deemed inviolate, than *a fortiori* the man himself should be immune from an unreasonable search, on pain of going to jail for refusal to answer incriminatory questions.

To be sure, to be deprived of any means by which a conviction can be obtained makes the job of law enforcement officers more difficult. But, as Judge Magruder states in *Muffie* v. *United States*, 209 F. 2d 225 (C. A. 1, 1954), our founding fathers judged that the loss of a short cut to conviction was better for this country than a deprivation of fundamental civil liberties.

> "They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecu-

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[15] *McNabb* v. *United States*, 318 U. S. at 347 (1943).

> tion should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." 209 F. 2d at 227.

It has never been part of American jurisprudence that convictions should be easy. The fundamental tenet of our law is that a man is presumed innocent until proven guilty. The privilege against self-incrimination is another way of stating this principle.

To compel the states to convict an accused only after its law enforcement officers have produced evidence apart from the testimony of the accused may make the path to truth more cragged, but in the process, the last vestige of the inquisitorial system of "justice" will have been laid aside.

**D. If the present difference between the Federal Government and the States in applying the Fifth Amendment is allowed to persist, the vitality of the Fifth Amendment will be seriously undermined: the problem of *Feldman* v. *United States*.**

One of the milestones on the path to *Mapp* was the elimination of the "silver platter" doctrine, which allowed the use in federal courts of evidence seized by state agents in violation of constitutional guarantees.[16] The evil of the doctrine was that federal and state officers frequently collaborated. The result for the defendant was the same as if the federal officers had conducted the illegal search and seizure in the first place, thus making the Fourth Amendment a "dead letter".

As the law now stands, a similar evil exists because of the federal-state dichotomy in the area of the privilege against self-incrimination. *Feldman* v. *United States*, 322 U. S. 471 (1943), held that the Fifth Amendment does not forbid the use in a federal court of self-incriminating testimony compelled in a state court. This Court has also held,

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[16] *Elkins* v. *United States*, 364 U. S. 206 (1960).

in *Mills* v. *Louisiana*, 360 U. S. 230 (1958), that even when there is evidence of active collaboration between federal and state officials, the state can still compel the testimony. Even though testimony thus compelled may not be admissible in a subsequent federal prosecution,[17] this result gives the defendant only partial protection.

> "To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any *prosecution* which might result from his compelled disclosures." [18]

Moreover, collaboration between federal and state officials can be so quietly and subtly done as to remain undetected, and an unconstitutional federal conviction might thus easily result.

There is no evidence in the record of this case of a contemplated federal prosecution. What is at issue is whether the Fifth Amendment, contrary to the holding of the Connecticut Court, should be made applicable to the states. We submit that if the Fifth Amendment were so applied, the difficulties posed for federal courts by the *Feldman* and *Mills* decisions would disappear. There would be no danger that, by federal-state collaboration, detectable or not, the vitality of the Fifth Amendment protection would be sapped.

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[17] See *Byars* v. *United States*, 273 U. S. 28 (1926).

[18] Mr. Chief Justice Warren, dissenting in *Mills* v. *Louisiana*, *supra* at 235.

## II

**Assuming that the Fifth Amendment is binding on the states through the Fourteenth Amendment, the test as to whether the questions asked might tend to incriminate petitioner must be fundamentally the same for the States as for the Federal Government. The States cannot determine that these questions tended to incriminate petitioner by use of improper constitutional standards.**

When *Mapp* v. *Ohio* established that the Fourth Amendment's prohibition against "unreasonable searches and seizures" was binding on the states, there was no need to spell out the standards by which "unreasonableness" was to be determined. The search of Miss Mapp's home was clearly unreasonable. A much closer case of "unreasonableness" was before the Court in the closing days of this past term. In that case, *Ker* v. *California*, 374 U. S. 23 (1963), the Court articulated for the first time the standards by which a state court's determination of reasonableness would be reviewed. The Court had three alternative tests:

1. A minimal Fourteenth Amendment due process test.

2. The federal test of "reasonableness", used by this Court in reviewing the judgments of federal courts.

3. A "state" test—hewing closely to the federal test, but somewhat less stringent due to absence of supervisory authority over state courts.

These tests are, of course, directly in point here because, due to the close relationship between the Fourth and Fifth Amendments, the same scope of review should be adopted here as was adopted in *Ker*.

In *Ker*, eight justices agreed that the third of the above tests should be adopted.[19] Recognizing that federalism

[19] The lone dissenter from this standard was Mr. Justice Harlan.

was by no means dead, the Court repeated its definition of "modern day" federalism:

> "'[A] healthy federalism depends upon the avoidance of needless conflicts between state and federal courts' by itself urging that '[f]ederal state-cooperation in the solution of crime under constitutional standards will be promoted, if only * * * [they] respect the same fundamental criteria in their approaches' ". 374 U. S. at 31.

Yet the Court in *Ker* indicated that the grey area was quite narrow between a state court's application of the same "fundamental criteria" as the Supreme Court and the stricter application of the Fourth Amendment expected of a federal court. In the first place the Court said the Fourth Amendment should be "liberally construed".[20] This caveat has likewise been applied by many decisions of this Court to the construction of the Fifth Amendment since the latter relates, like the Fourth, to the right of privacy of the individual.[21] Secondly, the Court noted that:

> "[F]indings of state courts are by no means insulated against examination here * * * While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings and the record so that it can determine for itself whether in the decisions as to reasonableness the fundamental—i.e. constitutional—criteria established by this Court have been respected." 374 U. S. at 34.

*Amicus* submits that this broad scope of review must be applied in the instant case.

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[20] See 374 U. S. at 33.

[21] See especially *Hoffman* v. *U. S.*, 341 U. S. 479 (1951).

## III

**In light of the fundamental constitutional standards laid down by this Court and lower federal courts, the courts below erred in concluding that to compel petitioner to answer the questions asked him would not violate his rights under the Fifth Amendment.**

### A. The content of the Constitutional standard, giving every possible benefit of the doubt to the accused: *Hoffman* v. *United States* and its progeny.

The leading recent case discussing the Fifth Amendment privilege against self-incrimination is *Hoffman* v. *United States*, 341 U. S. 479 (1951). Hoffman, like petitioner, had a police record and was called to testify at a special crime investigation. He was asked about his occupation and his contacts with a fugitive witness. A judge who had empaneled the grand jury and who was familiar with the context in which the questions were asked found no "real and substantial" danger in these questions and sentenced Hoffman for contempt when he refused to answer them. In reversing Hoffman's conviction this Court did the following:

1. Noted a signal increase in the number of cases in which the privilege against self-incrimination had been unsuccessfully invoked, and said that courts must be "alert to repress any abuses of the investigatory power." 341 U. S. at 485.

2. Said that the Fifth Amendment must be liberally construed.

3. Cautioned that too high a price might be paid for the unhampered enforcement of the criminal law and that other social objects of a free society should not be sacrificed.

4. Furnished a definition of the privilege against self-incrimination which is designed to give the witness every possible benefit of the doubt:

> "The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute * * * If the witness, upon interposing his claim, were required to prove the hazard * * * he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U. S. at 486-87.

5. Said that after using such a test, the trial judge must be "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." 341 U. S. at 488.

Soon after *Hoffman*, two cases involving the privilege came before the United States Court of Appeals for the Third Circuit. With the *Hoffman* decision as a guide, the Third Circuit decided that the answers to the questions in the setting in which they were asked would not incriminate two defendants. Both decisions were reversed *per curiam*, by this Court. *Greenberg* v. *United States*, 343 U. S. 918 (1952); *Singleton* v. *United States*, 343 U. S. 944 (1952).

Particularly noteworthy is the *Singleton* reversal.[22] Like petitioner, Singleton was in the "numbers racket" and had a police record. Singleton was asked what business three individuals were in. The trial record gave no indication that these individuals were notorious. Singleton made

[22] For a statement of the case see 193 F. 2d 464 (1952).

no attempt "to alter the picture, by indicating, even generally, the character or reputation of these individuals." 193 F. 2d at 467. Furthermore, a Special Assistant to the Attorney General testified that he did not know of any business connection between the three individuals and Singleton, and had no reason to believe that answers to the questions put to Singleton would incriminate him in a federal offense. Nonetheless Singleton's contempt sentences for refusal to answer was summarily reversed by this Court. Consistency demands a similar reversal in his case.

In *United States* v. *Coffey*,[23] which followed shortly after *Greenberg* and *Singleton*, the Third Circuit concluded, in the light of those recent decisions, that

> "in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry." 198 F. 2d at 440-441.

**B. Neither the trial court nor the Supreme Court of Errors of Connecticut applied correct Constitutional standards in determining whether the questions asked petitioner would tend to incriminate him.**

It is clear that this Court will give a witness every possible benefit of the doubt before upholding a sentence for contempt. We have also seen that there is a little, though not much, play in the joints of federalism for a state court to depart slightly from this approach. However, the test used by the courts below fell well short of the proper constitutional standard for determining the type of questions a witness is obliged to answer.

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[23] 198 F. 2d 438 (1952), cited with approval in *Emspak* v. *United States*, 349 U. S. 190 (1954).

1. THE FINDINGS OF THE SUPERIOR COURT OF HARTFORD COUNTY:

The draft finding contained in the "Memorandum of Decision" of the trial court judge gives some indication that he had the *Hoffman* test in mind (R. 12). Yet, when asked by petitioner's attorney to incorporate this "Memorandum of Decision" into his findings (R. 16), the trial court judge declined to do so. Instead of showing anything approaching the solicitude for the defendant shown in the federal cases above, the trial judge made the following finding (R. 21):

> "16. The questions propounded to petitioner do not indicate a danger to the petitioner of criminal liability which is *real and appreciable* with reference to the ordinary operation of law in the ordinary course of things (Emphasis added)."

Rather than take into account petitioner's possible fear that "incrimination might be approached by obscure and unlikely lines of inquiry,"[24] the trial court judge ruled that petitioner had no "reasonable ground" to fear criminal prosecution (R. 21, Finding 18). He thus demonstrated a lack of awareness of the "setting" in which the questions were asked. For petitioner was not an ordinary citizen being interviewed in a Roper poll. Rather he was a convicted criminal called to testify precisely because of his past record. Hence he was especially justified in being apprehensive of further prosecution. For as Judge Magruder noted in *Maffie* v. *United States*, *supra* at 228-29, which involved questions asked during an investigation into the notorious Brinks robbery:

> "* * * the witness may have reason to believe that he himself is under suspicion and that it will be the purpose of the interrogator to worm out of him all the self-incriminating disclosures possible. In that case, the situation of the witness approaches that of an accused person at a criminal trial, who

[24] See note 23 *supra*; *Coffey* v. *United States*, 198 F. 2d 438, 440-441.

> may elect to keep silent altogether. The witness may be willing to answer certain formal preliminary inquiries, as to matters generally known, such as his name, residence, age, et cetera. But he may have a justified apprehension of danger in answering further. He may not have the acuteness to see what an innocuous looking question, put by a resourceful cross-examiner, is leading up to. *Yet he might not be unreasonable in believing that the question was asked for a purpose, and that the purpose was to lead him into a booby trap in which he would make some disclosures useful to the prosecution in weaving a case against him.* (Emphasis added)."

We urge that standards similar to those applied to *Maffie* by Judge Magruder be applied by the Court in this case. It is clear that such standards were not applied by either of the courts below.

2. The Test Used by the Supreme Court of Errors of Connecticut.

In upholding the trial court, the Supreme Court of Errors of Connecticut used the test set forth in *McCarthy* v. *Clancy*, 110 Conn. 482 (1930) (R. 29-30). The *McCarthy* case rested in turn on the rule set forth in 1861 in England by Lord Chief Justice Cockburn in *Regina* v. *Boyes*, 1 *B. & S.* 311, 350, that the danger to the witness must be "real and appreciable" before he can refuse to answer. But it seems clear that the *Regina* v. *Boyes* test reflects notions of "due process" of a century ago, rather than today's more civilized standard of the *Hoffman*, *Singleton*, *Coffey* and *Maffie* cases, *supra*.

That the old *Regina* v. *Boyes* test is not this Court's test of whether questions tend to be incriminatory is evident from *Emspak* v. *United States*, 349 U. S. 190 (1955). This Court, in ruling that Emspak's assertion of the privilege was within his constitutional rights, relied on the *Hoffman*, *Greenberg*, *Singleton* and *Coffey* standard. In contrast, the old test of *Regina* v. *Boyes* was relied on in Mr. Justice

Harlan's dissent. It must finally be noted that Mr. Justice Harlan dissented in the *Mapp* case, and in *Ker* was the lone member of the Court to disagree with the standard of what would be an "unreasonable" search and seizure which elaborated on *Mapp*.

Thus, by using wrong constitutional standards, particularly the ancient test of *Regina* v. *Boyes*, both the trial court and the Supreme Court of Errors of Connecticut failed to consider properly whether the questions asked would tend to incriminate Petitioner.

## IV

**Petitioner's refusal to answer was justified: answers to the questions asked or an explanation why these questions could not be answered might have tended to incriminate him.**

### A. The Supreme Court of Errors of Connecticut mistakenly assumed that petitioner was immune from prosecution.

The Supreme Court of Errors of Connecticut ruled that petitioner's answers to those questions asked by the State's attorney which were directed to the time of his prior conviction could not tend to incriminate him because double jeopardy and the one year statute of limitations barred prosecution for either a misdemeanor or conspiracy to commit a misdemeanor (R. 33). We submit, however, that the Connecticut court was naive in assuming (R. 32) that simply because the questions asked related to the time of his earlier arrest, answers to those questions could not possibly furnish information which might lead to prosecution for a misdemeanor committed subsequent to that date. The same holds true with that court's ruling on a conspiracy to commit a misdemeanor—particularly if the conspiracy were a continuing one. The Record shows that petitioner was arrested as part of a gambling investigation (R. 27)

and the investigators wanted to find out about other gambling operations. Therefore, petitioner was asked who selected his bondsman, who paid his fine, etc., as well as a question not directed to the time of his original offense: "Do you know John Bergote?" (R. 10, 20). The Connecticut court was not justified in assuming that if these questions were answered, and all the people whose names were disclosed were rounded up, there could be no possibility of prosecution for a misdemeanor, or a conspiracy (continuing or not) to commit one. Moreover, the court did not consider the facts that the statute of limitations for Connecticut felonies (or their accompanying conspiracies) runs up to five years. Conn. General Statutes § 54-193.

**B. If petitioner or his counsel had spelled out the reasons for the refusal to answer, such elaboration would have negated the reason for the existence of the Fifth Amendment privilege.**

Neither petitioner nor his counsel elaborated on the reasons for petitioner's refusal to answer certain questions, other than to say that the questions might incriminate him.[25] They made a judgment that to spell out such reasons would be overly dangerous and amount, effectively, to a waiver of his privilege. Petitioner felt so convinced of this danger that he chose to go to jail, even though by making the requested disclosures he held the key to his cell in his own pocket. A similar lack of explanation was present in *Singleton* v. *United States*, 343 U. S. 944 (1952), a contempt conviction which this Court summarily reversed. In addition, petitioner's fear about answering, or explaining why he could not answer, were increased because, being a witness at a special inquiry, he did not have the additional

[25] Indeed, it appears from the Record (R. 31-2) that, with respect to the questions relating to the time of petitioner's earlier conviction, the lower court specifically refused to consider whether on their face and without requiring explanation, the questions were incriminatory, as required by the *Hoffman* test, *supra*.

safeguards which accrue to a criminal defendant on trial, such as the right of cross-examination. An analysis of the cases in which sentences for contempt on the basis of the claim of a Fifth Amendment privilege have been reversed by this Court and the Federal Circuit Courts, shows that most of them arose out of investigations similar to the one here, such as a grand jury investigation, or investigations by Congressional committees. Indeed, with respect to the Hartford investigation, there is no indication on the record that petitioner had the protection of secrecy which inheres in grand jury investigations. Under Sec. 54-47 of the Connecticut General Statutes such investigations can be public. Dean Griswold, in "The Fifth Amendment Today," *supra*, has warned us that the courts must be especially jealous to guard civil liberties in investigations.

## V

**Petitioner was justified in refusing to answer the questions asked because of a legitimate fear, under the doctrine of waiver, that if he answered some of such questions he might forfeit his constitutional privilege entirely.**

In 1951, this Court decided *Rogers* v. *United States*, 340 U. S. 367 (1951). Mrs. Rogers had been Treasurer of the Denver Communist Party and testified that she had certain records in her possession and had turned them over to another person. After these few disclosures, she refused to answer any more questions, claiming her privilege under the Fifth Amendment. The Supreme Court held that since she had answered some questions freely, she was deemed to have waived her privilege against self-incrimination and must answer all further questions on pain of contempt. As the dissent characterized it:

> "* * * at some uncertain point in petitioner's testimony, regardless of her intention, admission of asso-

> ciations with the Communist Party automatically effected a 'waiver' of her constitutional protection as to all questions." 340 U. S. at 377.

The doctrine of waiver has been much criticized,[26] not the least because of its uncertainty. It puts the witness who is being asked questions, in a dilemma. Consider petitioner's situation. If he refused to answer many questions, he might be held in contempt of court, as proved to be the case here. Yet if he had answered some questions asked him, he might find that, by his prior answers, he had waived all right not to incriminate himself. Since the point at which the doctrine of waiver comes into play is most uncertain, petitioner was hard put to know when to answer or when not to answer. Due to a lack of clear judicial guidelines, his attorney was equally hard pressed to advise him.

Perhaps the rule of the *Rogers* case should be overturned. However, despite its vagueness, the decision still stands. While it remains on the books, it is almost impossible for a witness to escape the Scylla and Charybdis of contempt and waiver. The existence, then, of the tricky waiver doctrine must be weighed in the balance as an important factor when this Court makes a determination whether petitioner was "reasonable" in refusing to answer. Frightened by the inquisitorial nature of the investigation, deprived of the opportunity for cross-examination, conscious of his past criminal record, mindful that his former bookmaking associates and others who if called to testify might implicate him in a conspiracy or felony, and, finally, fearful of the trap of the doctrine of waiver, petitioner's refusal to answer was reasonable.

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[26] See Griswold, The Fifth Amendment Today, pp. 22-23.

## CONCLUSION

**For the reasons stated above, petitioner's conviction must be reversed.**

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 110

WILLIAM MALLOY, *Petitioner*

*vs.*

PATRICK J. HOGAN, Sheriff of Hartford County, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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## BRIEF FOR RESPONDENT

## OPINION BELOW

The opinion of the Supreme Court of Errors is reported at 150 Conn. 520; 187 A. 2d 744, and appears in Transcript Of Record, p. 26 ff.

## JURISDICTION

The Judgment of the Supreme Court of Errors of Connecticut was entered on January 3, 1963. The petition for a writ of certiorari was filed April 19, 1963, and certiorari was granted June 3, 1963. The Jurisdiction of this Court rests on 28 U.S.C., Sec. 1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the Constitution of the United States, *infra*, Appendix, p. A-1.

Sec. 9 of Article First to the Constitution of the State of Connecticut, *infra*, Appendix, A-1.

Connecticut General Statutes, Revision of 1958, *infra*:

| | |
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## QUESTION PRESENTED

Whether the Fourteenth Amendment to the Constitution of the United States was violated by the State of Connecticut in ordering a witness to answer questions relating to gambling activities for which he had already been convicted and upon which the statute of limitations barred further prosecution, the claim of privilege having been made without any explanation whatsoever?

The numerical references prefaced by letter "R" refer to the page of Transcript Of Record. All statutory references are to Connecticut General Statutes, Revision of 1958. Appendix references are prefaced by letter "A."

## STATEMENT OF CASE

On September 11, 1959, the Petitioner and two others with him in the same apartment were arrested in a gambling raid at 600 Asylum Street, Hartford, Connecticut. He was charged with two counts of pool-selling, in violation of Sec. 53-295 of the General Statutes, a misdemeanor.

Subsequently, on November 5, 1959, he was found guilty on the first count of the information. He was ordered to pay a fine of $500, and was sentenced to one year in jail, execution of the jail sentence to be suspended after 90 days of service and thereafter to be on probation for two years. Immediately after sentencing a nolle prosequi to the second count of the information was entered. (R, 17, 27)

Sometime afterwards the Superior Court in Hartford County, pursuant to Sec. 54-47 of the General Statutes, entitled, "Investigations into Commission of Crime," appointed the Honorable Ernest A. Inglis, formerly Chief Justice of Connecticut and then a state referee, to conduct, in private, an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee and on January 16, 1961, the Petitioner Malloy, who had been so subpoenaed, appeared and was asked certain questions by the State's Attorney. (R, 27)

Malloy refused to answer all questions put to him on that date, except for giving his name and address, (R, 7, 8) on the ground that an answer would tend to incriminate him.

The State's Attorney then indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of Sec. 54-47. The referee suggested to Malloy that he consult a lawyer before he was summoned for contempt. (R, 8, 27) Contempt proceedings were not then instituted and nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. During the nine-day interval Malloy had full opportunity to and he did consult counsel.

The questions asked him on January 25, which he again refused to answer on the same claim of privilege, were practically identical with those he had been asked on his first appearance before the referee. (R, 7-10, 17-20)

The next day, on complaint of the State's Attorney, Malloy was brought before the Superior Court and, after a hearing, was adjudged in contempt for having failed to answer proper questions. He was ordered committed to jail until he answered the questions or until the further order of the court. Later that same day he made application for a writ of habeas corpus directed to the Respondent as the keeper of the jail. He claimed his confinement in jail was illegal because it was based on a denial of his constitutional privilege to refuse to answer questions on the ground of self-incrimination, in violation of the Fifth Amendment to the Constitution of the United States and of Sec. 9 of Article First to the Constitution of Connecticut. (R, 28)

A second hearing on the same issues was held on February 7, 1961, this being on the habeas corpus writ. The court found the issues for the Respondent and that Malloy was not unlawfully confined, and it dismissed the writ. From that judgment Malloy appealed to the Supreme Court of Errors of Connecticut, his claim of error being that his refusal to answer the questions was privileged. (R, 28)

Malloy was released on bond after the habeas corpus writ was dismissed. During all of these proceedings and at the time he was released on bond he was on probation from his conviction of November 5, 1959. (R, 12, 17)

Malloy did not introduce any evidence and he did not make any attempt before the referee or at either of the court hearings to suggest to the referee or the court how an answer to the questions could incriminate him. (R, 22, 31, 32, 34, 35)

The questions put to Malloy on January 16 and January 25 (R, 17-20) are summarized substantially as follows:

(1) For whom did Malloy work on September 11, 1959, the date he was arrested on the charge for which he was convicted?

(2) Who selected and paid his counsel in connection with that charge and his defense thereto?

(3) Who selected his bondsman and who paid him?

(4) Who paid Malloy's fine?

(5) What was the name of the tenant in the apartment in which he was apprehended?

(6) Did he know John Bergoti? (R, 28)

The Supreme Court of Errors held that since it did not appear that the Petitioner had reasonable ground to apprehend danger of incrimination, since the claim of privilege was made without any explanation, since the questions pertained to matters for which he had already been convicted, and since prosecution for the criminal activity in which the Petitioner had engaged was effectively barred by the statute

of limitations, there was no error by the trial court in ordering him to testify. (R, 30-35)

## SUMMARY OF ARGUMENT

Although this Court has several times indicated that the States are wholly free to compel a witness to incriminate himself, and as recently as 1961 said there was no federal constitutional right not to be required to incriminate one's self in state proceedings, *Cohen v. Hurley*, 366 U.S. 117, 127-8, Respondent is unable to reconcile such statements with recent decisions excluding involuntary confessions from state criminal trials. Respondent therefore concedes that such dicta should be qualified and that the accusatorial system is a fundamental concept in our society, guaranteed in state proceedings by the Fourteenth Amendment.

Respondent's principal argument for affirmance is that the decision below did not violate the fundamental principles of the accusatorial system embodied in the concept of "Due Process," but was a reasonable and just accommodation of the duty of a citizen to respond to orderly inquiry and his countervailing right to refrain from convicting himself through his own mouth.

There is, and will continue to be, substantial differences of opinion among the States as to the proper allocation of the burden of establishing the validity of a claim that answers will incriminate. There is no talismanic test. Nor does the text of the Fourteenth Amendment, its history, or its policy provide a ready answer.

Imposing identical standards upon both Federal and State Courts would be a misguided mistake, unsupportable in reason or policy, destructive of the basic values of federalism and, in the end, a disservice to the cause of individual liberty.

Finally, Respondent contends that even if the identical standards developed in cases arising under the Fifth Amendment are applied to the facts of this case, the decision below, given the latitude that the trial judge deserves, was a correct application of those standards, inasmuch as the Petitioner has at no time provided the courts with a basis upon which reasonably to infer that answers to the questions would endanger him.

## ARGUMENT

**1. The Fifth Amendment's privilege against self incrimination, *in all its particularities and peripheral characteristics*, does not apply to the States through the Due Process Clause of the Fourteenth Amendment.**

In *Twining v. New Jersey*, 211 U.S. 78, the Court held that it was not a violation of the Fourteenth Amendment for the State to permit the jury to draw unfavorable inferences from the failure of the defendant to testify. Holding that the privilege against self incrimination was not "a fundamental principle of liberty and justice which inheres in the very idea of free government" (*id.* at 106) but merely "wise and beneficient rule of evidence" (*ibid.*), the Court concluded that the right was "not secured by any part of the Federal Constitution." (*id.* at 114)

In 1947 the Court reaffirmed the *Twining* decision by a 5-4 vote in *Adamson v. California*, 332 U.S. 46. There the precise issue was the constitutionality of comment by the State on the failure of the accused to take the stand. Both decisions, therefore, involved peripheral aspects of the privilege, even though the approach taken by the Court in those cases tends to support the *dictum* that the "privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state" *Snyder v. Massachu-*

*setts*, 291 U.S. 97; *Adamson v. California, supra*, at 52. Yet no state has ever given the Court occasion to decide such a case, for all States have guarded the privilege since their inception, 48 of them expressing it in their constitutions. See 8 Wigmore, *Evidence* §2252 (McNaughton ed. 1961); *Twining v. New Jersey, supra.*

As recently as 1961, however, the *Twining* and *Adamson* decisions were cited by the Court as authority for the proposition that there is no federal constitutional right not to be required to incriminate one's self in State proceedings. *Cohen v. Hurley, supra*, 127-8. Respondent believes such broad *dicta* should be qualified and that the *Twining* and *Adamson* cases should be interpreted in their context as involving only penumbral characteristics of the privilege. The broad, sweeping statements made in such cases have been undermined by the recent decisions of this Court excluding coerced confessions from state criminal trials. The latter decisions cannot be squared with the notion that the States are wholly free to compel self incrimination.

The Court has recognized in federal cases that the doctrinal basis for excluding coerced confessions from federal trials is the Fifth Amendment's ban against compulsory self-incrimination, *Bram v. United States*, 168 U.S. 532; *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, and the right to refrain from incriminating one's self involuntarily also underlies the Court's decisions excluding coerced confessions from state trials.

Although Wigmore argues that confessions are not rejected because of any connection with the privilege against self incrimination and that the two principles should be kept "distinctly apart," his argument is historical and does not reflect the trend of decisions in this Court. See 3 Wigmore, *Evidence* §823 (3d ed. 1940). Wigmore contends that con-

fessions historically were rejected only if untrustworthy. *ibid.* It is doubtless an independent ground for excluding a confession under the Due Process Clause that the confession is unreliable, for a trial in which such a confession is used is an unfair trial, not calculated to produce the truth. As the Court noted in *Brown v. Mississippi*, 297 U.S. 278, a "trial is .... a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence."

But trustworthiness is no longer the test under the Due Process Clause. Assuring a conviction upon reliable evidence is not the only criterion by which confessions are tested. Due Process is denied, regardless of trustworthiness, whenever the confession was obtained by "methods . . . (which) offend an underlying principle in the enforcement of the criminal law; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540-1. This is precisely the principle behind the privilege against self incrimination. See *Knapp v. Schweitzer*, 357 U.S. 371: "The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self incrimination is the security of the individual against exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth."

It may be argued that the conduct of the police in coercing a confession does not itself violate the Constitution, but that merely the use of such a confession at the trial so transcends the boundaries of fairness as to "shock the conscience" of the Court. See *Mapp v. Ohio*, 367 U.S. 643, 684-5 (dissenting opinion); but *cf. Williams v. United States*, 341 U.S. 97. Yet the use of torture, starvation, threats of vio-

lence, and other conduct which "shocks the conscience" is not a *sine qua non* for excluding a confession from a trial; the sole test is "voluntariness." See *Rogers v. Richmond, supra; Blackburn v. Alabama,* 361 U.S. 199; *Haynes v. Washington,* 373 U.S. 503. The Court in going beyond the "conscience shocking" test and employing the exclusion device in an effort to preserve the principle of the accusatorial system against the temptations of the police to convert it into an inquisitorial system, has implicitly applied the core of the privilege against self incrimination to the States.

The argument made by Wigmore and others (see 8 Wigmore, *Evidence* §2252 (3rd ed., 1940)) that the privilege against self incrimination applies only to proceedings in which compulsory testimony is *legally authorized*, and not to evidence compelled by the police, is a product of his view that confessions are inadmissible only when untrustworthy. This distinction has not been applied by the Court, see *Bram v. United States, supra, Shotwell Manfuacturing Co. v. United States, supra,* and is rejected in the Model Code of Evidence (Rule 203) and the Uniform Rules of Evidence (Rule 25), both of which apply the privilege to inquiries by any "public official" of the state. (App. p. A-7)

Moreover, the distinction between legally authorized inquiries and lawless inquiries makes little sense, except in the realm of metaphysics.

The argument has been stated thusly:

> Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose — that one is excused from the legal consequences of contumacy — when there are no legal consequences of contumacy.

8 Wigmore, *Evidence* §2252, n. 27 (McNaughton ed. 1961).

Yet in excluding the fruits of evidence compelled by the police, this Court has recognized a right to be silent and, by excluding the confessions obtained in violation of this right, has used the only meaningful sanction available. Moreover, whether the police were "authorized" to compel the accused to answer has never been considered determinative in coerced confession cases.

Such distinctions have little place in Constitutional issues. The Court, in determining the permissible limits of police interrogation of an accused under the Due Process Clause, is not merely attempting to assure that the procedures employed to compel testimony are authorized by state law. If so, the states could avoid the fundamental principles reflected in such cases as *Rogers v. Richmond, supra,* merely by authorizing the police to force the prisoner to confess.

If the State were free to compel the accused to take the stand in the trial of his own case, and in fact attempted to do so, what rational foundation would remain for holding unconstitutional the coercion of a confession in the jail house, not by brutality or other conduct offensive to civilized standards of decency, but merely by holding the accused incommunicado until he confessed? What is the difference between a judge *putting* a witness in jail as a means of forcing him to confess, and a policeman *keeping* him in jail until he confesses?

Underlying the decisions excluding coerced confessions is the implicit assumption that an accused is privileged against incriminating himself, either in the jail house, the grand jury room, or on the witness stand in a public trial. The principal motivation for incommunicado coercion by the police

is the effort to circumvent the suspect's right of silence which will be available to him in the formal proceedings. *cf. Culombe v. Connecticut*, 367 U.S. 568, 571. The principal reason for excluding confessions coerced by the police is to preserve the right of silence available in later proceedings.

Even if an accused could be compelled to testify against himself in a trial, there would still be some motive for attempting to pry a confession from him before he had counsel. The coerced confession cases, therefore, also tend to preserve the right to counsel. Yet no federal right to have counsel present at all official interrogations has been recognized by the Court. See *In re Groban*, 352 U.S. 330; *Anonymous v. Baker*, 360 U.S. 287. So it is not merely protection of the right to counsel that is involved, but preservation of the right of silence. It is fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station. Frank recognition of the fact that the Due Process Clause prohibits the States from enforcing their laws by compelling the accused to confess, regardless of where such compulsion occurs, would not only clarify the principles involved in confession cases, but would assist the States significantly in their efforts to comply with the limitations placed upon them by the Fourteenth Amendment.

To suggest that the Fourteenth Amendment precludes the States from compelling an accused to confess, and that the basic principle of the accusatorial system embodied in the Fifth Amendment also applies to the States, does not require the conclusion that all the procedural characteristics developed in federal cases should be applied as well to the States. It is one thing to conclude that the accusatorial system has become a fundamental part of the fabric of our society and, hence, is enforceable against the States, and quite another to

say that the States should be given no room to differ in their interpretations of the periphery of this basic principle in its application to concrete investigatory problems. Reasonable, fair-minded men have disagreed over the precise policy to be served by the privilege as well as its application and its desirability in specific circumstances, even though the privilege has been recognized as a fundamental right by all of our fifty states without deviation. See generally, 8 Wigmore, *Evidence* §2251 (McNaughton ed. 1961). It is no less true today than it was fifty-five years ago, that "the difficulties of ascertaining [the] connotation [of the privilege] have been increased in American jurisprudence, where it has been . . . put to new uses as a limit on legislative power." *Twining v. New Jersey, supra,* 100.

Respondent does not agree with Petitioner that the Court's decision in *Mapp v. Ohio, supra,* logically requires that the self incrimination clause of the Fifth Amendment, together with all its procedural accouterments, should be read into the Fourteenth.

While the Court in *Mapp* noted the intimate relationship of the Fourth and Fifth Amendments (see 367 U.S. at 646-7, 656-7), the decision was based upon the guarantees of the Fourth Amendment. *Id.* at 655.

The issue in the *Mapp* case was whether the exclusionary rule of *Weeks v. United States,* 232 U.S. 383, held applicable only to federal courts in *Wolf v. Colorado,* 338 U.S. 25, should be applied to the States through the Due Process Clause. The Court having decided in *Wolf,* in 1949, that the "core" of the Fourth Amendment's protection against unreasonable searches and seizures was "implicit in the concept of ordered liberty" and therefore a requisite of Due Process, the only question decided by *Mapp* was that the "exclusionary rule is an essential ingredient of the Fourth Amendment

as the right it embodies is vouchsafed against the States by the Due Process Clause." *Mapp v. Ohio, supra,* at 651.

In deciding the basic question that the "security of one's privacy against arbitrary intrusion by the police" was guaranteed by the Fourteenth Amendment, the Court in *Wolf* found no inconsistency with *Adamson v. California, supra,* rendered only two years before. It can hardly be argued now, fourteen years after *Wolf*, that the principle of that case, vitalized by Mapp's exclusionary rule, is logically at odds with the *Adamson* decision.

Respondent is unable to argue, however, that the basic principle of the accusatorial system, at the core of the Fifth Amendment privilege, is any the less valuable or basic to a free society than the principles at the foot of the Fourth Amendment. What Respondent does deny is Petitioner's apparent suggestion that all the procedural aspects of the Fifth Amendment privilege are as basic and fundamental as the principle itself and should therefore be incorporated wholesale into the Fourteenth Amendment.

Insofar as recent decisions may be read as incorporating all the criteria of the Fourth Amendment into the Fourteenth, See *Ker v. California,* 374 U.S. 23, Respondent contends that the policies and procedural problems involved in searches and seizures of one's person or effects are far different from the complex configurations of the Fifth Amendment. Limitations on searches and seizures touch only a minor avenue of criminal investigation; the prohibition against self incrimination pervades them all — indeed, it is potentially present in all legal proceedings, civil, criminal, and administrative.

Moreover, the *Mapp* and *Ker* cases, broadening the scope of the Fourteenth Amendment as it applies to searches and

seizures, were merely accretions upon earlier decisions, chiefly *Wolf v. Colorado, supra* and *Elkins v. United States*, 364 U.S. 206. The *Mapp* and *Ker* decisions were reached only after a lengthy period during which the States were given an opportunity to adjust to the *Wolf* doctrine, to experiment with their own remedies for unreasonable searches and seizures, to assess the results, and to have them assessed by this Court. Only when those remedies have been found wanting and, presumably, when it became apparent to the Court that further steps would not seriously disrupt State criminal law administration, did the Court finally apply the same criteria to both States and Federal Government.

No single decision in the area of searches and seizures represented so abrupt and substantial a departure from the past as would the one which Petitioner nows asks the Court to make.

Potent policies counsel against shackling the States with all the penumbral characteristics and procedural properties of the Fifth Amendment privilege — policies in the service of both effective law enforcement and individual liberty.

"This Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement," *Elkins v. United States, supra,* 222, but in fashioning the standards governing claims under the Fifth Amendment, the investigative and enforcement problems at stake have been those of the Federal Government. The practical demands of the States are not comparable.

The primary responsibility for investigating, prosecuting, and preventing common criminality rests, in a federal system, upon the States. See *Abbate v. United States*, 359 U.S. 187, 195; *Screws v. United States*, 325 U.S. 91, 109. The interest of the Federal Government in investigating crime is

often ancillary to its primary functions and supplementary to the functions of the States. When the Federal Government is thwarted in an investigatory inquiry, the result is often merely to leave the problem where it primarily belongs, in the bosoms of the States. Only when both the States and the Federal Government are thwarted does law enforcement tend to crumble.

Moreover, a particular line of inquiry by the Federal Government is seldom crucial; it often is in the States. The Federal Government has the most proficient police force in the world, aided by an intricate, worldwide network of facilities for gathering, classifying, and transmitting information to assist it in ferreting out and prosecuting crime. Its subpoena and arrest powers are nationwide; its resources virtually unlimited.

Imposing identical limitations on the investigative powers of both States and Federal Government is like asking a giant and a dwarf to carry identical loads. It will ineluctably lead to more federal grand juries, more F.B.I. wiretaps, more Congressional Crime Committees, and more federal legislation designed to supplement the criminal law of the States; for if the States cannot cope with local crime, they will seek the superior advantages of the Federal Government. The threat to liberty lurking in federal excrescences upon state law has been noted often by members of this Court. See, *e.g.*, *United States v. Kahriger*, 345 U.S. 22; *Bartkus v. Illinois*, 359 U.S. 121; *Abbate v. United States*, *supra*. A decision which encourages this trend is at most a muffled blow for liberty.

Moreover, an essential value of federalism is imperilled when State and Federal standards are made from the same mold. As Mr. Justice Brandeis eloquently noted, "Our Government is the potent, the omnipresent teacher. For good

or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (dissenting opinion). The Federal Government is the omnipresent teacher for the States; it should be an experimental laboratory wherein the highest standards of criminal procedure are tried, tested, and held out for the States to follow. A single standard for both will necessarily attenuate the capacity of the Federal system for growth and leadership. When the federal standard limits not only the government whose concern with local crime is at most ancillary to its primary functions, but also the governments who bear the main burden — with resources minuscule in comparison — risk must be eschewed, flexibility sacrificed, experiments curtailed. A standard which can carry with it the burden of both systems of criminal law enforcement — federal and state — can only be a lower standard, a standard of stone, held in place by a calcified community consensus.

**2. The decision below was a reasonable accommodation of the right of a witness not to convict himself out of his own mouth and the duty of a citizen to respond to orderly inquiry in matters of legitimate and substantial importance to the state. *Furthermore*, the decision below was consistent with the standards adopted for Federal Courts in *Hoffman v. United States*, 341 U.S. 479.**

A. *Hoffman v. United States* is readily distinguishable.

Petitioner apparently seeks to bring this case under the shelter of the facts in *Hoffman*. Yet there has never been any contention by the Respondent that the questions asked Petitioner were wholly unrelated to any criminal activities in which Petitioner might have been engaged. Respondent would readily concede that had the Petitioner, at the time he was questioned, been *still subject to prosecution* for his pool selling offenses, he would be entitled — under State law — to refuse to answer questions regarding the name and identity

of his employer and the owner of the dwelling in which he had been taking bets. But such is not the case.

The criminality of Petitioner's conduct, to which the questions related, had been expurgated, both by his conviction and by the statute of limitations. That conviction expurgates criminality "is universally conceded." 8 Wigmore, *Evidence* §2279 (McNaughton ed. 1961). See also *United States v. Gernie*, 252 F.2d 664, 669-70 (2d Cir.); *United States v. Romero*, 249 F. 2d 371 (2d Cir.) Moreover, even if the witness has not been convicted, but the statute of limitations bars conviction, liability to punishment ceases and, with it, the privilege. See 8 Wigmore, *supra*, §2279.

B. There is nothing in the record, in the setting of the case, or in Petitioner's brief to support the inference that answers to the questions asked might reasonably tend to incriminate him.

Petitioner's suggestion that appearance of a "mere possibility" of incrimination is adequate to sustain the privilege is erroneous and has never been applied by any court. The Court in *Hoffman* did quote from *Temple v. Commonwealth*, 75 Va. 892, 898 to the effect that it was not "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have [a] tendency to incriminate." See *Hoffman v. United States*, *supra*, at 488. But in the setting of the *Hoffman* case it should be perfectly clear that the standard applied by the Court was less absolute than a literal reading of the naked words, torn from their context, might suggest. For the Court also said that, "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself — his say-so does not of itself establish the hazards of incrimination. It is for the court to say whether his silence is justified."

Unless the Court did not mean what it said in *Hoffman*, but intended the witness' say-so to be final, then there must be some affirmative appearance of danger before a witness is privileged from testifying.

The Court in *Hoffman* also said that the privilege is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer," citing *Mason v. United States*, 244 U.S. 362, 365 wherein the Court reiterated the century-old principle that the privilege does not extend to "remote possibilities out of the ordinary course of law." See also *Heike v. United States*, 227 U.S. 131, 144.

Manifestly, there was a greater showing of danger to the witness in *Hoffman v. United States*, than there is in this case. Moreover, in all of the cases cited by petitioner there were facts known to the trial judge which gave credence to the witness' claim and justified the inference that answers might assist the Government in prosecuting the witness for a criminal offense.

In *United States v. Doto*, 205 Fed. 2d 416 (2d Cir.), the witness was Joe Adonis who refused to tell the Kefauver Committee whether or not he had made any political contributions. The witness had a singular reputation as a racketeer, which had been buttressed by an earlier report of the committee billing him as "an underworld character" and head of a "major crime syndicate." The alleged object of the Committee's investigation was to uncover a tie-up between organized crime and public officials. The Court held the connection of the question to a number of federal crimes, including bribery, conspiracy, and mail fraud was clear. No remote possibilities were involved.

In *United States v. Coffey*, 198 F.2d 438 (3rd Cir.), the court upheld a witness' refusal to tell a federal grand jury

whether certain individuals were engaged in the numbers business. Since an answer to the question, affirmative or negative, would reveal the witness' own connection with illegal activity, the court properly upheld the claim.

In *Isaacs v. United States*, 256 F.2d 654 (8th Cir.), a grand jury was investigating possible criminal income tax evasion by unknown persons who received cash payments of $99,000 from a corporation of which the witness was president. The investigation was precipitated when the witness' son refused to disclose to a revenue agent the identity of the recipients because they "had not reported it as gross income" on their federal income tax returns. Called before the grand jury, the president, who had signed some of the checks made out to "cash," refused to disclose who received the money. Holding that an answer might reveal that the witness himself received some of the money, or that it might tend to prove that the witness conspired with the recipients to evade the income tax laws, the court upheld the privilege.

In *Maffie v. United States*, 209 F.2d 225 (1st Cir.), the witness refused to answer questions relating to his acquaintanceship with certain individuals reputed to be underworld characters and some of whom were suspected in the Brink's robbery. The witness himself had been investigated by the F.B.I. and four persons who had been questioned by the F.B.I. about him testified at the contempt hearing that they had informed the witness of the F.B.I. inquiries. The court held that the witness "had reasonable ground to fear that he was suspected . . . of being implicated somehow in the criminal transaction, and that he was being summoned before the grand jury in the hope that some incriminating disclosures could be extracted from him." *Id.* at 232.*

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* It is worthy of note that in three of the four cases above, *Doto, Coffey*, and *Maffie*, as well as in the *Hoffman* case itself, the federal investiga-

Great latitude should doubtless be given to a witness where it appears to the court that the witness can reasonably assume, as in *Maffie, supra* that he is a suspect and that the interrogator is trying to build a case against him. In such circumstances, even an otherwise apparently innocuous question might be used as a link in the prosecutor's chain. But where there is absolutely no evidence that the questions are being asked to construct a case against the witness, and where the setting of the inquiry suggests to the contrary, surely some showing must be made to convert an innocuous question into an incriminating one.

Petitioner suggests that the "approach" of the court below was "most unsophisticated" in failing to recognize the possibility that Petitioner may have committed a felony during his bet-taking activities. (Petitioner's Brief, p. 14) Yet not even in this Court is Petitioner able to suggest what that felony might be. If, like the witness in *Hoffman*, Petitioner had a twenty-year police record, had been listed as a "known gangster" and publically labelled as an "underworld character" and racketeer, perhaps it would not be unreasonable to ask the trial judge to speculate about the possibility that Petitioner may have committed a felony. No such facts exist. As far as appears from the record, Petitioner was simply an employee of an unknown gambling syndicate; and inasmuch as Petitioner asks the court to make several assumptions, "it might not be amiss to assume" (Petitioner's Brief, p. 14) that Petitioner, in receiving only a ninety-day jail term for his crime, was not considered a professional gangster.

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tory bodies were engaged in an activity designed to assist States in enforcement of essentially local crimes. The decisions, insofar as they may have thwarted the Federal Government in its efforts, nevertheless left the States free to pursue their own investigations. See Respondent's argument, *supra*, pp. 15-17.

Petitioner argues that surely "an experienced State's Attorney did not ask frivolous or harmless questions," (Petitioner's Brief, p. 14), implying that the questions were designed to trap Petitioner back into the jailhouse. Such an assumption is wholly unwarranted. It must appear fairly obvious that the State's Attorney was attempting to get information regarding the employers of Petitioner for the purpose of prosecuting them.

There is in this case no evidence to suggest that Petitioner ever committed any other crime than the one for which he was convicted. Nor is there any evidence to indicate that Petitioner feared, or had reason to fear, prosecution for any other crime. As the Court below was at pains to point out, even if the court indulged in the speculation that Petitioner participated in a conspiracy, there is no suggestion that the conspiracy would be for anything other than pool selling. Thus, the conspiracy would be barred by the statute of limitations. General Statutes, Sec. 54-197.

Petitioner does not complain that the state failed to bear its burden of proof that the statute of limitations expired. He did not suggest below, nor does he suggest here, that the statute of limitations was tolled by reason of a pending prosecution or Petitioner's absence from the state. Respondent submits that independent proof that the statute has not been tolled is required of the State only when the issue is raised and relied upon by Petitioner in the trial Court. Raising the issue could not itself incriminate Petitioner. There is, therefore, no reason why he should not be required to join issue on the point.

As this Court said in *Hoffman v. United States, supra* at 486:

> ". . . if the witness, upon interposing his claim, were required to prove the hazard in the sense in which

> a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Respondent submits that this test was not met by Petitioner. Neither before the Referee (R, 7-10) nor at the contempt hearing (R, 10-12) did Petitioner or his counsel offer any explanation whatever of the grounds upon which the claim of privilege was based. There was at that time no apparent reason why an explanation would itself constitute an incriminatory disclosure and no such reason has yet been suggested. Surely no claim of privilege is sustainable when there is neither explanation of the basis of claim nor argument advanced as to why even an explanation might be injurious. See *In re Pillo*, 11 N.J. 8, 21, 93 A.2d. 176.

In *United States v. Coffey, supra,* which Petitioner cites as "following the spirit of the *Hoffman* case," (Brief for Petitioner, p. 13) and which this Court quoted with apparent approval in *Emspak v. United States,* 349 U.S. 190, 198, n. 18, the Court said:

> "(To sustain the privilege) It is enough (1) that the trial court be shown *by argument* how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this

> suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant." (emphasis supplied)

No such argument or suggested linkage was made to the trial court. None was made to the Court below. None is made here.

The Court below *applied* federal standards and found the claim of privilege unwarranted. Thus, even if the Fourteenth Amendment is held to apply the full force of the Fifth Amendment's privilege against self incrimination to the States, the decision of the Supreme Court of Errors of the State of Connecticut should be affirmed.

If, as the Court said in *Hoffman*, "(t)he trial judge in appraising the claim must be governed as much by the peculiarities of the case as by the facts in evidence," *supra* at 487, then the trial judge's decision ought not to be upset unless patently wrong. As the Court noted in *Mason v. United States, supra* at 366, the trial judge,

> ". . is in (a) much better position to appreciate the essential facts than an appellate court . . . and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

The advantage of the state trial judge in appraising the claim of self incrimination is even greater than that of the

federal trial judge. Involving as it does a claim of incrimination under the laws of the state, only a state judge is likely to be familiar with the range of laws under which the claim might be made to fit. The Court will be accepting an impossible burden if it attempts to impose federal standards upon the States without at the same time granting substantial deference to the decisions of state courts in the concrete applications of those standards.

## CONCLUSION

The decision below was consistent with the standards laid down by this Court in *Hoffman v. United States, supra.* There was no evidence, no colorable claim, no argument, which could support the conclusion that answers to the questions asked would incriminate the Petitioner. There was nothing more than a bare assertion, incredible in the circumstances. Thus, even if federal standards were applicable to the States through the Fourteenth Amendment, the decision below would be correct.

But decisions of State Courts in self incrimination cases should not be judged by the identical standards employed by this Court in supervising claims arising under the Fifth Amendment in federal courts. The proper standard under the Due Process Clause is whether the State has departed from the fundamental priciples of the accusatorial system — whether the decision was a reasonable accommodation of the witness' duty to respond to an orderly inquiry and his right to refrain from convicting himself through his own mouth. Since there was no evidence that Petitiner was suspected of a crime for which he had not already been convicted, nor evidence that the State was seeking to snare him

by asking incriminating questions, a remote possibility that an answer might possibly be admissible evidence in a wholly speculative criminal prosecution does not give the Petitioner a constitutional right to refuse to testify in a matter of substantial importance to the State.

The decision of the Supreme Court of Errors of the State of Connecticut should be affirmed.

*Respectfully submitted,*

Respondent,

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## APPENDIX

*Fifth Amendment to Constitution of the United States*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*Fourteenth Amendment to Constitution of the United States*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*Sec. 9 of Article First to Constitution of Connecticut*

"In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favor; and in all prosecutions by indictment or information, a speedy, public trial by an impartial jury. He shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law. And no person shall be holden to answer for any crime, the punishment of which may be death or imprison-

ment for life, unless on a presentment or an indictment of a grand jury; except in the land or naval forces, or in the militia when in actual service in time of war, or public danger."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 1-1

"Any crime punishable by death or imprisonment for more than one year shall be deemed a felony, and any other crime, unless designated a felony by statute, shall be deemed a misdemeanor."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 51-35

"Any court may commit to jail any person legally summoned who refuses to appear and testify before it in any case, there to remain at his own expense until he so testifies; but no person shall be compelled to give evidence against himself, except as otherwise provided by statute, nor shall such evidence when given by him be used against him."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 52-199

"In the conduct of any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him or to disclose his title to any property the title whereof is not material to the hearing or trial in the course of which he is interrogated, and the right to refuse to answer a question, produce a document or disclose a title may be claimed either by the party interrogated or by counsel in his behalf."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 52-470

"The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments therein, and inquire fully into the cause of imprisonment, and shall

thereupon dispose of the case as law and justice require. No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his release by or in behalf of one who has been convicted of crime shall be taken unless the judge before whom the case was tried or a justice of the supreme court of errors, within ten days after the case is decided, certifies that a question is involved in the decision which ought to be reviewed by the supreme court of errors."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 53-295

"Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools, upon the result of any trial on contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carying on the business of the trans-

mission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure, or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 54-47

Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents

included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 54-193

"No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the pun-

ishment is or may be imprisonment in the State Prison, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the State Prison, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time."

*Connecticut General Statutes, Revision of* 1958, *Sec.* 54-197

"Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization expect upon proof of participation in or authorization of such acts or of the ratification thereof."

*Model Code of Evidence* (*Rule* 203)

SELF-INCRIMINATION: GENERAL

Subject to Rules 201, 205 to 208, and 231, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this State or any governmental agency or division thereof any matter that will incriminate him.

*Uniform Rule of Evidence* (*Rule* 25) — (1942)

SELF-INCRIMINATION: EXCEPTIONS

Subject to Rules 23 (privilege of accused) and 37 (waiver by contract or prior disclosure), every person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him . . .

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IN THE

# Supreme Court of the United States

October Term, 1963

No. 110

WILLIAM MALLOY,

*Petitioner,*

*against*

PATRICK J. HOGAN, Sheriff of Hartford County,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut**

## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

### Introduction: Interest of *Amicus*

The National District Attorneys' Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement. While the Association supports the position of respondent in the case at bar, its concern in this brief is with matters not directly raised by the parties: possible implications of this case for the validity of state "immunity statutes."

## ARGUMENT

**The Court's resolution of the questions presented in this case should not impair the effectiveness of state immunity statutes.**

Privileges against self-incrimination are contained in the constitutions of forty-eight states, and in the statutes or common law of the remaining two [see 8 Wigmore, EVIDENCE §2252, n. 3 (McNaughton rev. 1961); 58 AM. JUR., *Witnesses* §36; Kroner, *Self Incrimination : The External Reach of the Privilege*, 60 COL. L. REV. 816, nn. 4-7 (1960)]. To honor these privileges without sacrificing vital investigations of crime, all of the states have passed statutes that grant immunity from prosecution for any state crime revealed by a witness, in exchange for the witness's testimony [see Wigmore, *supra*, §2281, n. 11]. Many states have also enacted laws that compel a witness to answer incriminating questions, but prohibit use of such testimony against him. State courts have consistently held that by precluding state prosecution an "immunity statute" effectively supplants the state privilege against self-incrimination [see Wigmore, *supra*, §2281; Note, 38 A.L.R. 2d 225].

A state is powerless, however, to give witnesses immunity from prosecution beyond its jurisdiction—in other states, or in federal courts [*Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Jack* v. *Kansas*, 199 U. S. 372 (1905)], although Congress may, under the supremacy doctrine, confer upon witnesses in federal proceedings immunity from prosecution by the states [U. S. CONST. Art. VI, §2; *Adams* v. *Maryland*, 347 U. S. 179 (1954); *Ullmann* v. *United*

*States*, 350 U. S. 422 (1956); *Brown* v. *Walker*, 161 U. S. 591 (1896)]. While there are few state decisions directly concerning the power of a state to compel testimony that may incriminate under the laws of another state, many state courts have passed upon claims of possible incrimination under federal penal statutes. In the latter cases, state immunity statutes are generally upheld [see Wigmore, *supra*, §2258, n. 6; Kroner, *op. cit. supra*, pp. 827-35; 58 AM. JUR., *Witnesses*, §§51, 89; Notes, 59 A.L.R. 895; 82 A.L.R. 1380; 38 A.L.R. 2d 225]. This situation first came before the Supreme Court in *Jack* v. *Kansas* [199 U. S. 372 (1905)]. Jack, a witness in a state investigation of violations of the state anti-trust act, refused to answer questions under a grant of immunity, and alleged possible incrimination under federal anti-trust laws. His conviction for contempt was upheld by this Court, over his claim of deprivation of due process under the Fourteenth Amendment: "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough" [*id.* at 382]. The Court also found no "real danger" of a federal prosecution. Thus, *Jack* v. *Kansas* created almost a "conclusive presumption" that the danger of federal prosecution is unlikely [see Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMPLE L. Q. 57, 70 (1934)].

These principles were reasserted in *Knapp* v. *Schweitzer* [357 U. S. 371 (1958)]. In that case, an employer in a business in interstate commerce refused to testify in a state grand jury investigation of labor corruption, despite a grant of immunity, on the ground that the state

did not protect him against federal prosecution under the National Labor-Management Relations Act of 1947. This Court rejected his contention, primarily for reasons of the "historic distribution of power as between Nation and States in our federal system" [*id.* at 375]. *Knapp* v. *Schweitzer* has since been reaffirmed [*Mills* v. *Louisiana*, 360 U. S. 230 (1959); see *Slagle* v. *Ohio*, 366 U. S. 259 (1961)]. To rule otherwise, in "these days of the extensive sweep of such federal statutes as the income tax law," would be largely "to withdraw from the states their traditional power to investigate in aid of prosecuting conventional state crimes" [*Knapp* v. *Schweitzer*, *supra*, pp. 374-375, 378-379].

The grant of the instant writ of certiorari has aroused concern, however, as to the future viability of the state immunity statutes. Petitioner argues that the Fifth Amendment privilege against self-incrimination should be enforceable against the states. When *Knapp* v. *Schweitzer* and *Jack* v. *Kansas* were decided, as now, the states were bound solely by their own privileges against self-incrimination [see *Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908)]. If the states were obliged to honor the federal privilege, it might be argued, the immunity required to replace the privilege would have to be broader, and extend to possible federal prosecutions. Since the states cannot give such immunity, their power to question witnesses would be curtailed. This view appears in the instant case. A Friend of the Court urges, as one of the reasons for holding the privilege of the Fifth Amendment obligatory upon the states, that if the

federal privilege applied to the states, the states would be unable to compel testimony that might incriminate under federal statutes (see Brief of American Civil Liberties Union, *Amicus Curiae*, pp. 15-16).

This view of the implications of the case at bar for state immunity statutes is, we believe, incorrect. It stems largely from the confusing way in which the issues are commonly expressed: in physical metaphors. In this mode of expression, the privilege of the Fifth Amendment is said to "cover" the states, like a blanket (Brief for Petitioner, p. 4). The privilege is therefore deemed to "reach" from the federal courthouse across the street to the state grand jury room [*cf.* Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COL. L. REV. 816 (1960)]. Supposedly covered by this enormous federal blanket, the witness in the state proceeding scorns his grant of state immunity, which, too "narrow" to replace the federal protection, would leave him exposed to the drafts of federal justice.

The fault of this metaphorical treatment of the issues is its suggestion that what is involved here is the dimension of the privilege, not its nature. The actual question is whether the states are obliged to enforce certain principles that are also enforced in federal proceedings; the thrust of this case is the nature of the standards that state courts must enforce within their own realm, not the physical, geographical "coverage" of federal authority. Confusion is replaced by clarity if the issues in this case are expressed in terms of the "obligations" cre-

ated by the Fourteenth Amendment,[1] or the "enforceability" of the privilege in the states.[2]

Under the present state of the law, there is no reason to believe that the inclusion in the due process concept of a privilege against self-incrimination that is equivalent to the privilege of the Fifth Amendment would enfeeble state immunity statutes, despite the absence of immunization against federal prosecution. Under the present Fifth Amendment privilege,

> "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished" [*United States* v. *Murdock*, 284 U. S. 141, 149 (1931); see *Hale* v. Henkel, 201 U. S. 43 (1906); *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905)].

Under this clear and controlling precept, even were the states required to provide the same type of privilege that now obtains in federal courts, the state immunity statutes would remain a sufficient substitute, because the privilege now enforced in federal proceedings is not "cross-juris-

1. *Cf. Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 795 (1963): "We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made *obligatory* upon the states by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights". (emphasis added).

2. *Cf. Wolf* v. *Colorado*, 338 U. S. 25, 27-28 (1948): "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such *enforceable* against the states through the Due Process Clause" (emphasis added).

dictional." Thus, the principle of *Knapp* v. *Schweitzer* would be unaffected by a holding that this privilege is an element of due process. Of course, the opinion in *Knapp* pointed out that the Fifth Amendment privilege, along with other provisions of the Bill of Rights, was not obligatory upon the states. But this reference was not essential to the holding in *Knapp*, with its forceful enunciation of vital public policies: the historic reliance upon the states for the prosecution of conventional crimes, and the drastic effect upon these prosecutions if related Congressional legislation could be asserted as a bar to state investigations.

Plainly, a state may require testimony if the state gives the witness all the protection within its power—full immunity from state prosecution. But it need not follow that the testimony thus gained may be turned against the witness in a federal forum. The two matters are separate; the first is a problem of production, the second of use [see *Feldman* v. *United States* (dissenting opinion), 322 U. S. 471, 497 (1944); 8 Wigmore, EVIDENCE §2258, n. 3 (3rd ed. 1940), 1959 Supp. p. 125; Kroner, *op. cit. supra*, pp. 836-37]. Desirable policies concerning the administration of justice in the federal courts may well counsel the exclusion of such testimony at a federal trial. The sole obstacle to this result is the holding of *Feldman* v. *United States*, *supra*, a 4-3 decision, that self-incriminating testimony compelled under a state immunity statute is admissible at a federal criminal trial. If this ruling were reconsidered in an appropriate case [see *Knapp* v. *Schweitzer*, 357 U. S. 371, 381, 382, 384 (1958); *Mills* v. *Louisiana*, 360 U. S. 230-231, 233-234, 238-239 (1959)], such testimony could be ex-

cluded from federal courts under this Court's general power of supervision over federal justice [see *Elkins* v. *United States*, 364 U. S. 206 (1960); *McNabb* v. *United States*, 318 U. S. 332 (1943)], without impairing valuable state investigations. There is no cause for fear that this would permit interference with federal law enforcement by local investigators. Overruling *Feldman* would entail merely an exclusionary rule in federal trials, not immunity from federal prosecution. No undue prejudice to the government would occur, since the government would be in the same position as if there had been no local inquiry. In short, to solve the problems created by squaring *Feldman* v. *United States* with *Knapp* v. *Schweitzer*, sound policies of federalism indicate reconsideration of *Feldman*, not of *Knapp*.

This entire discussion assumes, *arguendo*, a holding in this case that the states must confer a privilege against self-incrimination that is substantially that of the Fifth Amendment. This line of reasoning is not intended to approve petitioner's position. Considering, however, that several Justices of this Court have announced for such a holding in previous cases, *Amicus* has considered some of the possible implications of the proposed holding. Curiously, the discussion has amounted to a dialogue between two Friends of the Court (see Brief of ACLU, pp. 15-16) on matters that are not involved in the facts of the case or raised by the parties. But such discussion is essential. Whatever the decision of this Court on the issues presented, language that failed to take account of these principles could create unnecessary doubts as to the force of *Knapp* v. *Schweitzer*—itself decided only after thorough

consideration of the policies behind the states' power to grant immunity. Then the state courts, witnesses, and their counsel might incorrectly consider the decision a justification for silence (see, *e.g.*, Brief of ACLU, pp. 15-16), and the benefit of *Knapp* to urgent state inquiries would be lost.

## Conclusion

***The judgment below should be affirmed, and the effectiveness of state immunity statutes should be unimpaired by this Court's decision.***

Respectfully submitted,

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## BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

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| Ker v. California, 374 U. S. 23 | 3 |
| Mapp v. Ohio, 367 U. S. 643 | 3 |
| People v. Talle, 111 Cal. App. 2d 650, 245 P. 2d 633 | 1 |
| Twining v. New Jersey, 211 U. S. 78 | 2, 3 |


### Statutes


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| California Constitution, Art. I, Sec. 13 | 1 |
| United States Constitution, Fifth Amendment | 1, 2 |


### Textbook


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| 2 Stanford Law Review, p. 5-139 | 2 |

IN THE

# Supreme Court of the United States

October Term, 1963
No. 110

WILLIAM MALLOY,

*Petitioner,*

*vs.*

PATRICK J. HOGAN, SHERIFF OF HARTFORD COUNTY,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.**

## BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

### Interest of Amicus Curiae.

The Constitution of California accords a privilege against self-incrimination. (Cal. Const., art. I, §13.) This privilege has been scrupulously protected by the California courts. (See *People v. Talle,* 111 Cal. App. 2d 650, 245 P. 2d 633.) The relationship between it and the privilege accorded by the Fifth Amendment to the United States Constitution is a matter of vital concern. (See *Adamson v. California,* 332 U. S. 46.)

## ARGUMENT.

While we support the position of respondent, we do so upon grounds not stated in respondent's brief. The law was settled by this Court not sixty years ago. (*Twining v. New Jersey*, 211 U. S. 78.) Forty years later, *Twining* was reaffirmed. (*Adamson v. California*, 332 U. S. 46.) Just three years ago, both *Twining* and *Adamson* were reaffirmed. (*Cohen v. Hurley*, 366 U. S. 117.) We would regard it, therefore, as unthinkable were they to be hastened into oblivion by any concession of respondent that they are tainted by time, that they are inconsistent with other decisions of this Court, or that they should no longer be law. (See Resp. Br. pp. 6-17.)

In our view, the historical record does not require this Court to hold, and would not justify this Court in holding, that the Fifth Amendment privilege against self-incrimination was incorporated into the Fourteenth Amendment by virtue of the latter's adoption. We are aware, of course, of the case argued with such eloquence and vigor by Mr. Justice Black. (*Adamson v. California*, 332 U. S. at pp. 68-123.) But the weight of the evidence is to the contrary. (See Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford L. Rev. 5-139.) Nor do we think such an abrupt departure from existing law compelled, much less justified, by the recent decisions of this Court on such disparate topics as confessions and searches and seizures. Surely the point of the confession cases is that a state may not use an extrajudicial confession obtained by what may be described as methods of bar-

barism. (See *Haynes v. Washington*, 373 U. S. 503.) And surely it is the point of the search and seizure cases that in the absence of consent or probable cause to arrest, a state may not use evidence obtained through unregulated rummaging by the police. (See *Mapp v. Ohio*, 367 U. S. 643; *Ker v. California*, 374 U. S. 23.) None of these cases, we submit, afford convincing analogies to the case at bar or add weight to the argument that *Twining* and *Adamson* should be overruled.

## Conclusion.

Believing, as we do, that *Twining* and *Adamson* were rightly decided, we urge that the judgment appealed from be affirmed.

Respectfully submitted,

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